136 (7)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1886

No. ~~983~~ 624 ~~396~~ 71

THE CENTRAL TRUST COMPANY OF NEW YORK AND HENRY FINK, RECEIVER, APPELLANTS,

vs.

MRS. M. H. C. BACON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED Sep. 13th 1886.

SUPREME COURT OF THE UNITED STATES.

October TERM, 1886

No. .....

CENTRAL TRUST COMPANY OF NEW YORK, ET AL., APPELLANTS,

vs.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY, ET AL., APPELLEES.

In re INTERVENING PETITION OF MRS. M. H. C. BACON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

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S. E. NEWMAN & CO., PRINTERS, KNOXVILLE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION.

At a Circuit Court of the United States, begun and held at Knoxville, for the Eastern District of Tennessee, on Tuesday, the Twentieth day of July, A. D., Eighteen Hundred and Eighty-six—present, the Honorable Howell E. Jackson, Circuit Judge, and Honorable D. M. Key, District Judge.

CENTRAL TRUST COMPANY of New York,
Complainant,
and
1. THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY,
2. THE TENNESSEE STATE LINE RAILROAD COMPANY, and,
3. SAMUEL THOMAS,
Defendants.

IN EQUITY.
No. 787.
INTERVENING PETITION
OF
MRS. M. H. C. BACON.

This was a Bill filed to foreclose a Mortgage given on the 15th of June, 1881, by said East Tennessee, Virginia and Georgia Railroad Company, to said Complainant, upon its property, rights, franchises, etc., situated in the States of Tennessee, Georgia, Alabama and Mississippi. Upon the filing of said bill, Henry Fink was, on the 6th day of January, 1885, appointed the Receiver, and was placed in possession of the whole of said Railroad's property. Afterwards, during the progress of said cause, and by order and authority of said Court, an intervening petition was filed in said cause by Mrs. M. H. C. Bacon, in substance following, to-wit:

Petitioner is the widow of one H. H. Bacon, who was killed by the running of the trains of said Defendant Railroad Company, and the petitioner, in the name of one Adam Thomas, Administrator, recovered a judgment against said East Tennessee, Virginia and Georgia Railroad Company, at the May term, 1885, of the Circuit Court of Bradley county, Tennessee, as damages for said personal injury to and death of her said husband, which injuries were done by said Railroad Company in the operation of its railroads in this State subsequent to the 15th of June, 1881. The said judgment was for the sum of Seven Thousand and Five Hundred Dollars, besides all costs in a suit instituted prior to the appointment of the Receiver in this cause, and at the September term, 1885, of the Supreme Court of Tennessee the said judgment of the Circuit Court of Bradley county was affirmed, and the same now remains in full force and wholly unsatisfied. Petitioner filed her said intervention and asked that this Court do order said

judgment paid in accordance with the laws of Tennessee, under the proviso to Section Three, Chapter Twelve, and to the Third Section of Chapter Seventy-two of the Acts of the Legislature of Tennessee of the year 1877, which proviso is as follows: "That no Railroad Company or Corporation shall have the power under this act, or any other law of this State, to create a Mortgage or other kind of lien on its property in this State, which shall be valid and binding against judgments or decrees or executions therefrom for timbers furnished, or work and labor done on its road, or for damages done to persons or property in the operation of its road in this State."

Said petitioning intervenor prayed the Court that the said judgment for said damages for the death of her said husband, might be decreed by this Court as superior in dignity to the lien of the said Complainant Trust Company's Mortgage; and said intervenor prayed for this ruling, not only on the provisions of the aforesaid statute of the General Assembly of Tennessee of 1877, but also upon the general law applicable to said case so made by said intervention.

To this Petition of said intervenor the said Complainant, the Central Trust Company of New York, and also said Henry Fink, the Receiver, demurred in writing, substantially as follows, to-wit:

First: Because said intervention contained no equity.

Second: Because it appeared that the said judgment against said East Tennessee, Virginia and Georgia Railroad Company was based on a personal tort happening after the execution, delivery and registration of the said Mortgage of said Railroad Company to said Central Trust Company.

Third: Because it does appear that the property described in said Mortgage had been seized by this Court, and placed in the hands of its Receiver, and the lien of said Mortgage sought to be enforced against both the earnings and corpus of said railroad property, long before the judgment mentioned in said intervening petition had been rendered.

Fourth: Because it does not appear that said judgment for personal injuries entitled the intervening petitioner to have the same paid out of earnings of the said Defendant Railroad Company during the receivership.

Fifth: For other good and sufficient causes of demurrer appearing on the face of the petition.

The case coming on to be heard at this term upon the said intervening petition of said M. H. C. Bacon, there occurred as questions upon the argument and hearing of the said demurrer before the said Circuit Court,--said two judges presiding:

I. Whether petitioner's judgment, for personal injuries to her deceased husband, is entitled to priority of satisfaction out of the income of the said receivership, as a debt which in equity is a first charge on the income arising from the operation by the Receiver of the Mortgaged premises?

II. Whether petitioner's judgment is entitled to priority of satisfaction out of the fund now in Court arising from the sale of said East Tennessee, Virginia and Georgia Railroad, as a debt which, under the general laws applicable thereto, and independently of any statute of the State of Tennessee, is a charge upon said fund prior in right to the lien of the bondholders under the said Mortgage of the 15th of June, 1881?

III. Whether the act of the General Assembly of Tennessee, approved the 24th of March, 1877, Pamphlet Acts, page 92, makes petitioner's judgment superior to the lien of said Mortgage of 15th June, 1881?

IV. Whether the third proviso to the third section of said act of 24th March, 1877, is valid and constitutional?

V. Whether petitioner as a general creditor of said Defendant Railroad Company,—and aside from the said act of 27th of March, 1877,—would be entitled to have the fund disbursed by the Receiver, from time to time, under the direction and order of this Court, restored and the assets marshaled for said petitioner's benefit?

Upon said demurrer judgment was awarded for the said Mrs. M. H. C. Bacon, intervening petitioner, upon the aforesaid questions of law, by said Circuit Judge: whereupon an appeal by certificate of division was prayed for and granted in open court to the said Central Trust Company of New York and the said Receiver.

Upon all of which aforesaid questions of law the opinions of said judges were opposed: Whereupon, on motion of said Complainant, by their solicitors, Butler, Stillman and Hubbard, and Henry B. Tompkins, and of said Receiver by his solicitor, William M. Baxter, that the points on which the disagreement hath happened may, during the present term, be stated under the direction of the judges, and certified under the seal of the Court, to the Supreme Court, to be finally decided:

It is ordered that the foregoing statement of the pleadings, and the following statement of facts, which is made under the direction of the judges, be certified according to the request of the said Central Trust Company of New York, and Henry Fink, Receiver, by their solicitors, and the law in that case made and provided, to-wit:

First: The Consolidated Mortgage so, as aforesaid, foreclosed, was made and delivered on the 15th June, 1881, by the said East Tennessee, Virginia and Georgia Railroad Company to the said Complainant to secure an issue of $22,000,000 of 5% Mortgage Bonds, upon which default being made in the payment of interest, this bill was filed to foreclose the same on the 6th of January, 1885.

Second: The said Mortgage was given by said Tennessee Railroad Corporation by virtue of the laws of Tennessee then in force, and upon its property, rights, franchises, etc., in the States of Tennessee, Georgia, Alabama and Mississippi.

Third: The said Defendant, the East Tennessee, Virginia and

Georgia Railroad Company, was a Consolidated Company, formed by consolidation between the East Tennessee and Virginia Railroad Company and the East Tennessee and Georgia Railroad Company, under an act of the State of Tennessee, entitled: An Act to liquidate the State Debt contracted in aid of Railroad Companies. Passed 25th of February, 1869.

Fourth: The said Receiver in this cause was appointed on the 6th of January, 1885, and took possession of the aforesaid Mortgaged premises on the 7th of January, 1885.

Fifth: A foreclosure of said Mortgage was decreed by this Court in this case on the 18th of March, 1886: A sale of the Mortgaged premises, the said East Tennessee, Virginia and Georgia Railroad, in the States of Tennessee, Georgia, Alabama and Mississippi, was made by the Special Master on the 25th of May, 1886: And an order confirming said sale was made on the 28th of June, 1886: And in said decree of confirmation it was recited: "That the said purchasers shall take the said property, subject to, and that the said purchasers assume and pay off any and all debts, claims and demands of whatsoever nature now pending and undetermined in either of the Courts in which the original and ancillary bills in this cause are pending, which may be allowed or adjudged by this Court or either of said Courts," and the cause retained for further consideration.

Sixth: Since the appointment of the Receiver, he has, under the order and direction of this Court, and from the receipts of said East Tennessee, Virginia and Georgia Railroad, and from moneys received by him from the Treasurer of the said Railroad Company, upon his appointment as Receiver, made permanent improvements on said road, and paid interest on underlying bonds of dates prior to the Mortgage of 15th of June, 1881, to an amount in excess of the said judgment of petitioner.

Seventh: The Consolidated Mortgage sought to be foreclosed was issued under the laws of the State of Tennessee as they existed on the 15th of June, 1881. Subsequent to the consolidation of the East Tennessee and Virginia Railroad Company with the East Tennessee and Georgia Railroad Company, under said acts of 1869, and prior to the issuing of said Mortgage of the 15th of June, 1881, and after the year 1877, to-wit: in the years 1880 and 1881, said Consolidated Corporation, under its charter and the laws of Tennessee, acquired other lines of railroad by purchase, in the States of Georgia, Alabama and Mississippi; consolidated these properties with its original lines in Tennessee, and issued said Consolidated Mortgage upon its original property and its acquired properties, as a whole system, known as the East Tennessee, Virginia and Georgia Railroad.

Eighth: The amount realized from the said sale of said Mortgaged premises on the 25th of May, 1886, was insufficient to pay off in full the said outstanding Mortgage Bonds, and the unpaid coupons thereon.

Ninth: There remains in the registry of the Court the sum of

Be it remembered that at a Circuit Court of the United States began and held for the Northern Division of the Eastern District of Tennessee, at the Federal Court room in the city of Knoxville within said District and the Sixth Circuit, on the second Monday, it being the 12th day of July, A. D., 1886

Present and presiding, the Honorable D. M. Key, Judge, etc., the following proceedings were had, to-wit:

THURSDAY MORNING, July 15th, 1886.

Court met pursuant to adjournment.

Present and presiding, the Honorable Howell E. Jackson, Judge of the United States Circuit Court for the Sixth Judicial Circuit, and the Honorable D. M. Key, Judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

CENTRAL TRUST COMPANY of New York, *vs.* EAST TENN., VA. & GA. R. R. COMPANY, *et al.*	IN EQUITY. No. 787.

INTERVENING PETITIONS

OF

LOTTIE T. GEORGE, W. J. MCSWEEN, JOS. R. SIMPSON, *Adm'r*, MARY EDWARDS, *Adm'x*, F. M. DEARMOND, NATHAN SHIPLEY, W. S. HUGHES

AND

M. H. C. BACON.

Ordered, that the demurrers of the respondent Henry Fink, Receiver, and of the Central Trust Company of New York, to each of the foregoing intervening petitions, be and the same are hereby overruled; and that said Receiver and said Central Trust Company make answer to each of said petitions, within ten days,—to which action of the Court in overruling said demurrers, said Receiver and said Central Trust Company except in law.

Forty-eight Thousand Dollars ($48,000.) Touching said fund, the decree of confirmation, which was made at a special term of this Court, held between the regular terms of January, 1886, and July, 1886, provides as follows: "That he (the Special Master) pay the residue of said proceeds into the registry of this Court, to be divided pro rata among the said Consolidated First Mortgage Bonds and coupons, which shall not have been received in part payment of the purchase price, without preference to one over the other or of interest over principal."

Tenth: At said sale of said Mortgaged premises on the 25th of May, 1886, a committee acting in behalf of a large majority of the bondholders of said Consolidated Mortgage, became the purchasers as purchasing trustees acting as a committee on behalf of bondholders, and the title to said Mortgaged premises was vested in said purchasing trustees by the decree of confirmation aforesaid.

By reason of said opposing opinions of said two judges on the aforesaid questions of law arising in this cause, made by said demurrer to said intervening petition of said M. H. C. Bacon, said judges have caused this certificate of division to be signed and placed of record, in open court, this the day and year first above written

HOWELL E. JACKSON,
Circuit Judge.

D. M. KEY,
District Judge.

Be it remembered that at a Circuit Court of the United States began and held for the Northern Division of the Eastern District of Tennessee, at the Federal Court room in the city of Knoxville within said District and the Sixth Circuit, on the second Monday, it being the 12th day of July, A. D., 1886

Present and presiding, the Honorable D. M. Key, Judge, etc., the following proceedings were had, to-wit:

THURSDAY MORNING, July 22nd, 1886.

Court met pursuant to adjournment.

Present and presiding, the Honorable Howell E. Jackson, Judge of the United States Circuit Court for the Sixth Judicial Circuit, and the Honorable D. M. Key, Judge of the United States District Court for the Eastern and Middle Districts of Tennessee.

CENTRAL TRUST COMPANY of New York, *vs.* THE E. TENN., VA. & GA. R. R. COMPANY, *et al.*	IN EQUITY. No. 787. INTERVENING PETITION OF MRS. M. H. C. BACON.

Comes the Central Trust Company of New York, and Henry Fink,

Receiver, and pray an appeal by certificate of division to the next term of the Supreme Court of the United States at Washington, from the action of the Court in entering judgment for the intervening petitioner upon the demurrer heretofore filed herein; and said appeal is granted upon appellants giving bond and security for costs within thirty days from this date.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF TENNESSEE,
CIRCUIT COURT—SIXTH CIRCUIT.

CENTRAL TRUST COMPANY of New York,
vs.
EAST TENN., VA. & GA. R. R. COMPANY,
et al.

No. 787.
In re
INTERVENING PETITION
OF
MRS. M. H. C. BACON.

Know all Men by these Presents, that we, the Central Trust Company of New York, Henry Fink, Receiver, &c., Henry B. Tompkins and William M. Baxter, are jointly and severally held and firmly bound unto M. H. C. Bacon, the intervening petitioner herein, in the sum of Two Hundred Dollars ($200.00), to be paid to the said M. H C. Bacon and her heirs and assigns, for which payment well and truly to be made we, each of us binds himself, his heirs, executors and administrators firmly by these presents.

Sealed with our seals, and dated this 9th day of August, 1886.

WHEREAS, lately at a regular term of the Circuit Court of the United States for the Eastern District of Tennessee, begun and held at the city of Knoxville within said District and the Sixth Circuit, on the 12th day of July, 1886, the said petitioner recovered judgment against the defendant Railroad Company; and whereas, an appeal from said judgment by certificate of division was prayed by the Central Trust Company of New York and said Henry Fink, Receiver, &c., to the Supreme Court of the United States, which appeal was granted. Now the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect, and answer all costs, if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

CENTRAL TRUST COMPANY of New York,
By HENRY B. TOMPKINS, Attorney.
HENRY FINK, Receiver. [SEAL.]
HENRY B. TOMPKINS. [SEAL.]
WM. M. BAXTER. [SEAL.]

Filed August 10th, 1886.

EASTERN DISTRICT OF TENNESSEE—*ss.*

I, A. R. Humes, Clerk of the United States Circuit Court for the Eastern District of Tennessee, do hereby certify that the foregoing is a full, true and perfect copy of the original certificate of division upon the intervening petition of M. H. C. Bacon, the order allowing appeal and the appeal bond in the cause mentioned in the caption hereto, as the same appears on file and of record in my office.

Witness my hand and the seal of said Court, this August 27th, 1886.

[SEAL.]

A. R. HUMES,

Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

IN EQUITY. No. 71.

CENTRAL TRUST COMPANY OF NEW YORK, AND HENRY FINK, Receiver,
Appellants,

vs.

M. H. C. BACON,
Appellee.

Appeal on Certificate of Division from the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF FOR APPELLANTS.

EDGAR M. JOHNSON,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

CENTRAL TRUST COMPANY OF NEW YORK and HENRY FINK, as Receiver,
Appellants,
vs.
M. H. C. BACON,
Appellee.

In Equity. No. 71.

APPEAL ON CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

Brief for Appellants.

STATEMENT OF THE CASE.

On June 15, 1881, the East Tennessee, Virginia and Georgia Railroad Company executed a mortgage—

"upon its property, rights, franchises, etc., situated in the States of Tennessee, Georgia, Alabama, and Mississippi,"

to the Central Trust Company of New York, as Trustee, one of the appellants herein, to secure an issue of $22,000,000 Consolidated Mortgage Bonds (Record, p. 3).

Default having been made in the payment of interest

on said bonds, the Trust Company, on January 6, 1885, filed a bill to foreclose the said mortgage upon the said properties.

On the same day Henry Fink, the other appellant herein, was appointed Receiver of the property, covered by the mortgage, and on the next day, January 7, took possession of the same (Record, p. 1).

Subsequent to said 15th day of June, 1881, and prior to said January 6, 1885, one H. H. Bacon was run over and killed by a train of the said Railroad Company, and in May, 1885, the administrator of his estate recovered, for the benefit of his widow, the appellee above named, a judgment of $7,500, and costs against the said Railroad Company, as damages for his death, which judgment the Supreme Court of Tennessee affirmed in September of the same year (Record pp. 1, 4).

Thereupon Mrs. Bacon, as did several others, who had claims of a similar nature, filed an intervening petition in the said foreclosure suit of the *Central Trust Company of New York* vs. *East Tennessee, Virginia and Georgia Railroad Company, et al.*, then pending (Record, p. 1), praying for an order directing the Receiver to pay her the amount of her said judgment (Record, p. 2):

(1) On the ground of an act, entitled,

"An Act to amend the law in relation to the Consolidation of Railways,"

passed March 24, 1877 (Acts 1877, Ch. 72, p. 92), which contains a "proviso" in its third section:

"That no railroad company shall have power under this Act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work done on, or for *damages done to persons* and property in the operation of its railroad in this State," and

(2) "Also upon" the ground of "the general law applicable to said case so made by said intervention."

On either of these grounds, the petitioner alleged that the lien of her judgment was superior to that of the Trust Company's mortgage, and entitled to payment prior to the bonds secured thereby.

To this petition the Trust Company and the Receiver filed demurrers denying the petitioner's right to intervene (Record, p. 2):

"*First.*—Because said intervention contained no equity.

Second.—Because it appeared that the said judgment against said East Tennessee, Virginia and Georgia Railroad Company was based on a personal tort happening after the execution, delivery and registration of the said mortgage of said Railroad Company to said Central Trust Company.

Third.—Because it does appear that the property described in said mortgage had been seized by this Court and placed in the hands of its Receiver, and the lien of said mortgage sought to be enforced against both the earnings and corpus of said railroad property, long before the judgment mentioned in said intervening petition had been rendered.

Fourth.—Because it does not appear that said judgment for personal injuries entitled the intervening petitioner to have the same paid out of earnings of the said defendant Railroad Company during the receivership.

Fifth.—For other good and sufficient causes of demurrer appearing on the face of the petition."

On argument, the Judges were opposed in opinion, Judge JACKSON, who presided, being against the demurrers, and Judge KEY in favor of sustaining the same. The view of the former accordingly prevailed, and the demurrers were overruled (Record, p. 3), on July 12th, 1886, with direction to the Trust Company and Receiver to (Record, 5a.)

"make answer to each of said petitions, within ten days,—to which action of the Court in overruling said demurrers, said Receiver and said Central Trust Company except in law."

The following are the questions upon which said Judges were divided in opinion. (Record, pp. 2-3.)

"I.—Whether petitioner's judgment, for personal injuries to her deceased husband, is entitled to priority of satisfaction out of the income of the said receivership, as a debt which in equity is a first charge on the income arising from the operation by the Receiver of the mortgaged premises?

"II.—Whether petitioner's judgment is entitled to priority of satisfaction out of the fund now in Court, arising from the sale of said East Tennessee, Virginia and Georgia Railroad, as a debt which, under the general laws applicable thereto, and independently of any statute of the State of Tennessee, is a charge upon said fund prior in right to the lien of the bondholders under the said mortgage of 15th June, 1881?

"III.—Whether the Act of the General Assembly of Tennessee, approved the 24th of March, 1877, Pamphlet Acts, page 92, makes petitioner's judgment superior to the lien of said mortgage of 15th June, 1881?

"IV.—Whether the third proviso to the third section of said act of 24th of March, 1877, is valid and constitutional?

"V.—Whether petitioner as a general creditor of said defendant Railroad Company,—and aside from the said Act of 27th of March, 1877,—would be entitled to have the fund disbursed by the Receiver, from time to time, under the direction and order of this Court, restored and the assets marshalled for said petitioner's benefit?"

Thereupon, on motion of counsel for the Trust Company and Receiver, it was ordered that the points on which the disagreement had happened should be certified, with a statement of pleadings and facts, to this Court for final decision. (Record, p. 3.)

In amplification of the facts certified in the Record, and to properly explain the grounds presented by the certificate of division and underlying the demurrers, it will be necessary for us to further state as follows:

In 1835-6, the legislature of Tennessee passed

"An Act to incorporate the Hiwassee Railroad Company."

which corporate name was changed by an act of February 4, 1848 (Acts 1847-48, Ch. 169, Sec. 3, p. 272), to "East Tennessee and Georgia Railroad Company."

Neither of these acts contain any provision on the subject of the company's power to mortgage.

On January 27, 1848, the legislature of the State (Public Acts of 1847–8, ch. 120, p. 195) passed

"AN ACT TO INCORPORATE THE EAST TENNESSEE AND VIRGINIA RAILROAD COMPANY,"

which act contains, among other provisions, the following:

"SEC. 15. *The said company may at any time increase its capital to a sum sufficient to complete the said road, and to stock it with everything necessary to give it a full operation and effect*, either by opening books for new stock, or by selling new stock, or *by borrowing money on the credit of the Company, and on the mortgage of its charter and works*; and the manner in which the same shall be done and in either case shall be prescribed by the stockholders at a general meeting. And any State, or any citizen, corporation or company of this or any other State or country may subscribe for and hold stock in said Company, with all the rights, and subject to all the liabilities of any other stockholder."

"SEC. 28. *The said Company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.* This charter, however, shall be amendable from time to time by the legislature; whenever the president and directors shall unanimously petition for amendments; and when such *amendments shall be adopted by the Legislature and submitted to the directory, and be accepted and adopted unanimously by the president and directors, they shall be obligatory on the stockholders, and not otherwise.*"

On February 25, 1869 (Acts of 1868–9, Ch. 38, p. 50), the legislature passed

"AN ACT TO LIQUIDATE THE STATE DEBT CONTRACTED IN AID OF RAILROAD COMPANIES IN THE STATE OF TENNESSEE,"

which provides as follows:

"SEC. 3. *Be it further enacted*, that in order to facili-

tate the *Railroad Companies* that may wish to avail themselves of the provisions of this Act in repaying the indebtedness due the State, respectively, they or any of them, *are hereby authorized to consolidate their property in whole or in part with other Railroad Companies*, and issue bonds and stock provided for in the second section of this Act, *and may adopt the corporate franchise of either of the roads* as the stockholders may elect, and each Railroad Company paying its indebtedness, and such Railroad companies as may consolidate under the provisions of this Act, are hereby authorized to determine by a vote of the stockholders of said Company or Consolidated Companies, the number of Directors of such Company, and elect the same under the new organization, and that the said Directors so elected, shall, according to the by-laws and rules of said corporation, elect one of their number President of said Company."

Under this act the two companies above mentioned consolidated (Record, p. 4) and adopted the "corporate franchise" of the East Tennessee and Virginia Railroad Company, as appears from section 2 of the following amendatory act, "passed," December 17, 1869 (Acts of 1869–70, Ch. 36, p. 45):

"AN ACT TO AMEND AN ACT PASSED FEBRUARY 25, 1869, AND TO PERMIT RAILROADS TO SELECT A NEW NAME.

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That if any of the Railroads of this State shall consolidate their interests and franchises, as provided by AN ACT of the General Assembly, passed February 25, 1869, they are hereby authorized to adopt the name of either of the roads so consolidating, or a combination of the names of all the roads, or a new name; *Provided*, however, that the adopting of said new name shall not release either one of the roads from any and all liabilities they are separately under, to the State of Tennessee, under and by the laws of this State; and, *Provided further*, that, under their new name, *the Railroads thus consolidated, shall succeed to all the privileges and immunities, and be subject to all the liabilities of the respective roads existing previous to their consolidation; Provided further*, that said consolidation shall not operate so as to abate any suit pending at the time of consolidation in favor of or against either of said roads so consolidating.

"SEC. 2. *Whereas, the East Tennessee and Virginia and the East Tennessee and Georgia Railroad Companies, have consolidated into one corporation*, under the provisions of An Act entitled "An Act to liquidate the State debt created in aid of railroads," passed the 25th day of February, 1869; and *Whereas*, it is desirable that the consolidated Company's name should carry into it the names of the consolidated Companies;

Be it therefore enacted by the General Assembly of the State of Tennessee, First: That *the name of the consolidated Company is hereby changed from the East Tennessee and Virginia Railroad Company to the East Tennessee, Virginia and Georgia Railroad Company;* and that the shares in said Company shall be one hundred dollars, with quarter, half, and three-quarter shares, representing twenty-five, fifty and seventy-five dollars; and these fractional shares shall be entitled to fractional votes in the meetings of said Company. 2. The Company is hereby authorized to issue bonds running to maturity at such date, and bearing such rate of interest as may be deemed best, with which to retire the State debt, under the provisions of the Act of the 25th of February, 1869; and all laws and parts of laws in conflict with these provisions, are hereby repealed: *Provided*, that the issuance of the bonds hereby authorized shall, in no way, impair any liens reserved by the State, on either of said roads so consolidating, except as provided in said Act of 25th of February, 1869.

"SEC. 3. *Be it further enacted*, That this Act shall take effect from and after its passage."

By acceptance of this act as a part of its charter the company's name was changed to the "East Tennessee, Virginia & Georgia Railroad Company" (Record, p. 4, top), and to its ownership of the "corporate franchise" of the East Tennessee & Virginia Railroad Company under the prior act, are now added "all the privileges and immunities of the respective roads."

This, then, is the consolidated company which made the mortgage above referred to, and these are all its railway properties in the State of Tennessee which such mortgage covered (Record, p. 4, bottom).

On May 5, 1870, the rights, privileges and immunities above acquired were expressly exempted from subsequent alteration by the Constitution of 1870, Art. XI, § 8, which provides as follows:

"The General Assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed, and *no such alteration or repeal shall interfere with, or divest, rights which have become vested.*"

Such was the legal *status* of the Company when on March 24, 1877 (Acts of 1877, Ch. 72, p. 92), there was passed—

"AN ACT TO AMEND THE LAW IN RELATION TO THE CONSOLIDATION OF RAILWAYS."

The third section of which concludes as follows:

"and *provided further, that no Railroad Company shall have power under this act, or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State,* which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or *for damages done to persons* and property *in the operation of its railroad in this State.*"

This act, together with the acts of 1871 and 1873 on the same subject, are printed in full in the Appendix hereto (p. xxiv *et seq.*).

"In the years 1880 and 1881" (Record, p. 4), although, as our argument will show, the fact does not affect the situation:

"Said consolidated corporation, under its charter and the laws of Tennessee, acquired other lines of railroad by purchase in the States of Georgia, Alabama and Mississippi."

And on June 15, 1881, said company placed the mortgage securing the bondholders whom the appellants herein represent upon (Record, p. 4).

"Its original lines in Tennessee. * * * and its acquired properties as a whole system, known as the East Tennessee Virginia and Georgia Railroad."

The purchase of these foreign lines was made pursu-

ant to Section 1 of Chapter 69 of the Acts of 1871, entitled,

"AN ACT GRANTING CERTAIN POWERS TO EXISTING RAILROAD CORPORATION,"

which act is printed in full in the appendix (p. xxiv).

The power to mortgage these foreign properties was given by Chapter 9 of the Acts of 1881, approved March 15th, and entitled,

"AN ACT CONCERNING THE POWERS OF RAILROAD COMPANIES NOW OR HEREAFTER EXISTING UNDER THE LAWS OF THIS STATE, OR OF THIS STATE AND ANY OTHER STATE, OR STATES, AND WHOSE ORIGINAL CHARTER OF INCORPORATION WAS GRANTED BY THE STATE OF TENNESSEE,"

which act is printed in the appendix (p. xxix).

It is on the narrow question of the right of the company to make this mortgage free from the effect of a judgment recovered for a subsequently accruing cause of action for personal injuries that this appeal is presented for decision.

Assignment of Error.

The Circuit Court erred in overruling the demurrers to the intervening petition and in entering judgment upon said demurrers in favor of petitioner and against respondents.

ARGUMENT.

We take it for granted that no objection will be made to a consideration of any act hereinbefore or hereinafter mentioned. If our assumption, however, should prove

to be incorrect, then we answer in the language of Chief Justice WAITE, in

Elwood vs. *Flannigan*, 104 U. S., 562, 568.

"There was probably no necessity for the proof of the laws of Michigan which was made, as the Courts of the United States take judicial notice of all the public laws of the several States. *Owing* vs. *Hull*, 9 Pet., 607; *Covington Drawbridge Company* vs. *Shepherd*, 20 How., 227."

and if it be objected as to some of these acts, that a charter is not a public law, we refer to the case of

Young vs. *Bank of Alexandria*, 4 Cranch, 383, MARSHALL, *C. J.*, which decides that (*syllabus*):

"The Act of Virginia incorporating the Bank of Alexandria is a public law,"

and as conclusive of this question in its every aspect we cite the recent case of

Unity vs. *Burrage*, 103 U. S. 447, in which Mr. Justice WOODS, delivering the unanimous opinion of the Court, uses the following language (p. 455, italics ours).

"An Act passed by the Legislature of Indiana, February 14, 1848, to incorporate the Ohio & Mississippi Railroad Company * * * was declared a public act by the Court in *Commissioners of Knox County* vs. *Aspinwall*, 21 How., 539"

and referring (p. 451) to an act of Illinois amending an act supplementary to 'an Act to incorporate the Decatur and Indianapolis Railroad Company' the learned Judge continues (p. 456):

"We think that the act * * * is a public act of which *the Courts are bound to take judicial notice, and that it need not be specially pleaded.*"

Moreover, the charter of the East Tennessee & Virginia Railroad Company was passed and is printed in

the Acts of Tennessee of 1848 (Acts 1847-8; Chap. 120, p. 195) as a public law, and the charters of the original companies were, one or both, amended or recognized in the public acts of 1849-50, chap. 11 and 256; 1851-52, chap. 72 and 151; 1855-56, chap. 120; 1867-68, chap. 17, §§ 13 and 14; 1869-70, Chap. 36, §§ 2 and 3.

Acceptance by the company of these charter rights, would thus conclusively appear, even if the record (pp. 3-4) did not admit such to be the fact.

Before proceeding further with our discussion, however, we may frankly refer to the fact that within a week, or on October 28th, 1889, the Supreme Court of Tennessee in the case of *Frazier* vs. *E. T. Va. & Ga. Ry. Co.*, has surprised us with a decision, which passing upon the effect of this mortgage, seeks to decide each of the several questions certified against us. Its opinion for convenient reference, we have printed in the appendix hereto.

That this Frazier decision will be urged for adoption by this Court, we have not the slightest doubt but that the ground of discussion in this Court is not "foreclosed" to any of the points made by us is obvious.

(1.) Two of the five questions certified involve mainly a construction of the Federal Constitution. Hence, as to these, we merely quote the following language of Mr. Justice MATTHEWS, in

> *Louisville & Nashville Railroad Company* vs. *Palmes*, 109 U. S., 244; 256, viz. (italics ours):

"The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. *In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State Court, whether there is a contract, and whether its obligation is impaired;* and if the decision of the question as to the existence of the alleged contract requires a construction

of State constitutions and laws, we are not necessarily governed by previous decisions of the State Courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property."

(2.) Two others of the five questions involve matters of general law and equity.

As to the result of this, we need only quote from *Burgess* vs. *Seligman*, 107 U. S., 20, that (p. 34)

"It is the right and duty of the Federal Courts to exercise their own judgment, as they always do, in reference to the doctrines of commercial law and general jurisprudence."

(3.) The remaining question involves, including a construction, in certain respects, of local law, the constitution of Tennessee. Our remarks under this heading are equally applicable to those which have preceded.

(*a.*) The record in the two cases is entirely different, as the Frazier opinion indicates, and the present case *originated* in a Federal Court.

(*b.*) The present case is between different parties, who are moreover citizens of different States.

On the effect of this circumstance, and with pointed application to the case at bar in other respects as well, Mr. Justice MATTHEWS, in *Carroll County* vs. *Smith*, 111 U. S., 556, 562-3, italics ours, says:

"The decision in *Hawkins* vs. *Carroll County*, above referred to, is not a judgment of the Supreme Court of Mississippi, construing the Constitution and laws of the State, which, without regard to our own opinion upon the question involved, we feel bound to adopt and apply in the present case. *It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other parties.* It was not a rule previously established, so as to have become recognized as settled law, and which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States, in a litigation growing out of the same facts, of which they have

jurisdiction by reason of the citizenship of the parties, the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those Courts, to determine for themselves what is the law of the State, by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State, suing in another, the choice of resorting to a federal tribunal."

And Mr. Justice BRADLEY in *Burgess* vs. *Seligman*, *supra*, refers to the fact of different citizenship as one which should induce this Court to more readily give an independent judgment in such questions, viz. (p. 34, italics ours) :

"As, however, the very object of giving to the national Courts jurisdiction to administer the law of the State in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by *local prejudice and sectional views*, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

That our case has not been foreclosed by previous adjudication conclusively appears from *Carroll County* vs. *Smith*, *supra*.

(*c.*) The bonds secured by the mortgage were negotiated prior to the decree in the Frazier case, and while a decision of a contrary tenor was the latest expression of the Supreme Court of Tennessee.

Previous to the time when these bonds were placed upon the market this decision in the Buck case, of April 21, 1877, was controlling upon the point. This state of municipal law, under the ruling in *Ogden* vs. *Saunders*, 12 Wheat., 213, 259, 262, entered into the contract and was a part of it. The Supreme Court of Tennessee now seeks to impair the obligation of this contract. Naturally in such cases this court will intervene when it can.

Moreover, as said in *Burgess* vs. *Seligman*, supra, pp. 33-4 :

"So when contracts and transactions have been entered into, and *rights have accrued thereon under a particular state of the decisions*, or when there has been no decision of the State tribunals, *the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted* by the State Courts *after* such rights have accrued."

From the statement in the case just cited, it is an undeniable conclusion that it is incumbent upon this Court to disregard the decision in the Frazier case, made not only after the accruing of the bondholders' rights, but subsequent to the commencement of this litigation, unless fully satisfied of its soundness.

(*d.*) In *Tennessee* vs. *Whitcomb*, 117 U. S., 139, 146, this Court did not hesitate to repudiate the construction which the Supreme Court of Tennessee had put upon a clause of its own State Constitution when satisfied that such constitution was wrong.

The questions above set forth in this statement of facts we may now consider in a somewhat different order from that in which they are certified, and we shall now seek to show under the following points that they should be answered in the negative, the appellants' demurrers sustained, and the petition of the appellee dismissed.

I.

The second question certified should be answered in the negative.

This qustion is (Record, p. 3):

"II.—Whether petitioner's judgment is entitled to priority of satisfaction out of the *fund now in Court*,

arising from the sale of said East Tennessee, Virginia and Georgia Railroad, as a debt which, *under the general laws* applicable thereto, and *independently of any statute of the State of Tennessee*, is a charge upon said fund prior in right to the lien of the bondholders under the said mortgage of the 15th of June, 1881?",

and the fact is certified that a "fund" of $48,000 (*ibid.*, pp. 4-5, paragraph Ninth) remains in the registry of the Court under order--

"to be divided *pro rata* among the said consolidated First Mortgage Bonds and coupons, which shall not have been received in part payment of the purchase price, without preference to one over the other, or of interest over the principal,"

But it also appears (*ibid.*, p. 4, paragraph "Eighth"), that:

"The amount realized from the said sale of said mortgaged premises on the 25th of May, 1886, was insufficient to pay off in full the said outstanding Mortgage Bonds, and the unpaid coupons thereon."

What the common law of Tennessee on this subject was at the time this mortgage was placed, and the bonds secured thereby were negotiated, is proven by the opinion in the case of

Buck vs. *Memphis & Little Rock R. R. Co.*
(Mss. Supreme Court of Tenn., decided April 21, 1877),

a copy of which, for the Court's convenience, is printed in the Appendix to this brief, and of which decision judicial notice will be taken (*Pennington* vs. *Gibson*, 16 How., 65).

Here it appears that the defendant company had duly executed a deed of trust to Henry F. Vail, Trustee, dated March 1, 1871, and registered June 20, 1872, to secure a million dollars bonds, and covering its main line of railroad and its equipment in Arkansas (Appendix, p. ii) and its net profits (*ibid.*, p. iv). On Octo-

ber 11, 1872, plaintiff filed his bill in this suit to recover on a promissory note, given by the company for railroad supplies furnished it prior to said date, and levied an attachment, among other things, on some cars and on certain money of the company then on deposit with the Union and Planters' Bank in Tennessee (*ibid*, pp. i and ii). Respecting the cars, the Court, per FREEMAN, J., uses this language:

"Some cars found on this side of the river and levied on, probably acquired after the conveyance to Vail was made, but of this we have no definite evidence. Be this as it may, the question whether the cars pass under the deed, as appertaining to the main line of road is one free from all difficulty. By a large preponderance of authority they would so pass.

"They make up part of the equipments of such a road, and for all practical purposes must be held appurtenant to the same, and in this view making up one element of a conveyance of a road, and appurtenances, especially so, where from the conveyance it is seen such road is to be used in aid for in discharging the obligation created by the mortgage, on which it has been given to secure." (*ibid*, p. iv).

As to the moneys in the bank, the opinion continues:

"The question is, are such moneys liable to complainant's attachments. The deed being registered before the commencement of this suit, excludes complainant, unless he can reach the fund on some other ground, provided earnings are embraced in the deed and go by virtue of it" (*ibid*, p. iv).

Thereupon, after finding that this condition is fulfilled and that the moneys attached were earnings and were included in the deed, the discussion on this branch of the case concludes thus:

"Without more, we hold the earnings of the road are not liable to be attached to pay a debt not created before* the deed was made, as in this case, but existed after*" (*ibid*. p. vi).

*In the copy of opinion hereto annexed (Appendix, p. vi), "before" and "after" are transposed. But as the whole context shows, it is a clerical error, we have taken the liberty of rectifying it in the above excerpt.

Thus, as to all the property covered by the deed and attached, the complainant was defeated, although his claim comes in for every equitable consideration urged for the claim of Frazier in the annexed opinion. As "an operating expense" it is, in our judgment, of a distinctly higher *legal* nature.

This decision, moreover, expressly distinguishes (App., p. v) the case of *Clay* vs. *E. T. Va. & Ga. R. R. Co.* (6 Heisk., 431), which is cited by the Frazier opinion as opposed to our view.

In any event, the view this Court will take of this question may be seen from the recent language of Mr. Justice MATTHEWS in *St. Louis, etc., R. R. Co.* vs. *Cleveland, etc., R. R. Co.*, 125 U. S., 658, 673-4, (Italics ours), viz:

"It cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the *proceeds of a sale* of the property itself over those creditors who are secured by prior and express liens. * * * *

"There has been no departure from this rule in any of the cases cited, it has been adhered to and reaffirmed in them all."

It is, true, as laid down in *Fosdick* vs. *Schall*, 99 U. S., 235 (pp. 251-2): that there are some contract debts, like those evidenced by Receiver's certificates, incurred to keep the railroad going and productive, which, on the principle of saving the ship which governs the priority of payment in case of bottomry bonds in the law of admiralty, would be entitled to the preference above claimed.

But we believe the case has yet to be decided which tends to support the ground taken by the other side when they claim that the fact of the mortgagor's remaining in possession involves the conclusion that claims like appellee's are to be paid ahead of the mortgage in legal contemplation.

At common law therefore, at the time this Transcript of Record was filed, or—

"under the general laws applicable thereto and inde-
"pendently of any statute of Tennessee,"

the appellee's judgment is clearly inferior not superior to the mortgage of the Trust Company with respect to the proceeds "arising from the sale" of the said railroad herein concerned, and the question stated should therefore receive a negative answer.

II.

The third question certified should be answered in the negative.

This question is (Record, p. 3):

"III.—Whether the act of the General Assembly of Tennessee, approved the 24th of March, 1877, Pamphlet Acts, page 92, makes petitioner's judgment superior to the lien of said mortgage of 15th June, 1881?"

In other words, can this Act of March 24, 1877 (quoted *supra*), or rather, the third proviso of its third section, have any application to the mortgage executed by the East Tennessee, Virginia and Georgia Railroad Company, on its railway property in the States of Tennessee, Georgia, Alabama and Mississippi, in the action to foreclose which mortgage, the appellee's petition of intervention herein was filed?

We may answer the question as follows:

First.—The East Tennessee, Virginia and Georgia Railroad Company could not be subjected involuntarily to any burden on its power to execute this mortgage attempted to be imposed by legislation, subsequent to the passage of the acts constituting its charter, as the Act of March 24, 1877.

The consolidated mortgage was made as the Record (p. 4) states:

"under the laws of the State of Tennessee as they existed on the 15th of June, 1881,"

but that Act of 1877 is not one of the laws so referred to.

(*a.*) As to mortgage of the company's "railway property" in Tennessee, which is all this legislation proposes to affect.

The fifteenth section of the charter of the East Tennessee and Virginia Railroad Company, granted March 27, 1848, (quoted *supra*) gave it full power to raise money at any time

"to complete the said road, and to stock it with everything necessary to give it a full operation and effect * * * by borrowing money on the credit of the company and on the mortgage of its charter and works."

This power was extended to the East Tennessee and Georgia Company when the two companies consolidated and adopted the "corporate franchise" of the former under Section 3, the Act of February 25, 1869 (quoted *supra*).

The effect of such consolidation, as Mr. Justice STRONG states in *Railroad Company* vs. *Georgia*, 98 U. S., 359, 363, was

"to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former,"

and so the Supreme Court of Tennessee has expressly decided as to our company in the case of

Deaderick vs. *Wilson*, 8 Bax., 108, at 127.

These acts, together constitute the charter of the new and consolidated company and form a contract between it and the State, the obligation of which no subsequent legislation could impair.

Trustees of Dartmouth College vs. *Woodward*, 4 Wheat., 518.

For no right of alteration or repeal is reserved in these

acts, nor in the Act forming the charter of the East Tennessee & Georgia Railroad Company above mentioned, a copy of which, if the Court desire, we will submit herewith, as it is not printed in the public laws of that year.

The 28th section (quoted *supra*), of the "corporate franchise" of the consolidated Company, on the contrary, expressly provides that amendments thereto by the Legislature shall be binding only,

"when accepted and adopted unanimously by the president and directors * * * and not otherwise."

If it be argued that his power has lapsed, we urge the presumption of continuance that the original state of incompletion still exists, and in the absence of evidence to the contrary, we are certainly in a position to assert this fact, but were this otherwise, such power, in any event, was saved from lapsing under the 28th section of the Charter (*supra*), which provides that the company

"shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work."

But aside from this charter right to mortgage the original lines, we have another, if, as is the fact, we are not disposed to yield to the assertion of the *Frazier* opinion (Appendix, p. xv), sustained to be sure by Mr. Jones in his work on Railroad Securities, sections 1–10, that

"Legislative authority is essential to a mortgage of corporate property and franchises."

To the contrary with us at least is

Shepley vs. *R. R. Co.*, 55 Me., 395, 407.
Kennebec R. R. Co. vs. *Portland R. R. Co.*, 59 Me., 9, 23.

Certainly the decision of this court in *Thomas* vs.

Railroad Co., 101 U. S., 71, that this proposition is true of a lease is not in point and no stronger case can be cited by the appellee. For while a lease is a contract voluntarily suspending the exercise of corporate functions that of foreclosure sale which may result from a mortgage for money borrowed is but the same result that would follow under execution sale were an unsecured debt not paid, and surely the last does not require statutory permission.

If, therefore, in 1869, the company had, on general principles of jurisprudence, a common law right to mortgage its road, this right was permanently secured to it from future alteration by the Act of December 17, 1869, granting to the then new company (sec. 1)

"All the privileges and immunities of * * * * the respective roads existing previous to the consolidation."

It is, therefore, manifest, that the Company could execute the consolidated mortgage as to its original lines, which were all the "railway property" it owned in the State of Tennessee, under the acts constituting its charter, and that no such act as that of March 24, 1877, could be made to affect the freeest exercise of this right, any intention on the part of the General Assembly of 1877 to the contrary, notwithstanding.

(*b.*) As to purchase and mortgage of the company's "railway property" in Georgia, Alabama and Mississippi, referred to in the Record (p. 4), viz. :

"In the years 1880 and 1881 said consolidated corporation, under its charter and the laws of Tennessee, acquired other lines of railroad by purchase in the States of Georgia, Alabama and Mississippi; consolidated these properties with its original lines in Tennessee, and issued said consolidated mortgage upon its original property and its acquired properties as a whole system known as the East Tennessee, Virginia and Georgia Railroad."

For power to "purchase" the new "lines of

railroad" mentioned in the foregoing excerpt, the "Consolidated corporation" availed itself of the first portion of the first section of the Act of December 12, 1871 (printed in Appendix, p. xxiv, see italics), and it was authorized to place the "consolidated mortgage" upon such "railway property" by the Act of March 15, 1881, at that time the most recent and liberal act on the subject of railroad mortgages in Tennessee (printed in Appendix, p. xxix), neither of which acts contain any provision qualifying the dignity of mortgage liens.

It is, therefore, evident, that the Company had also unrestricted power to execute the consolidated mortgage as to its "railway property" in Georgia, Alabama, and Mississippi, for the *proviso* of the Act of 1877 above referred to is expressly limited to—

"railway property in this State" (meaning the State of Tennessee).

(*c.*) If, consequently, the Company had placed two mortgages, one on its domestic lines and the other on its foreign lines, no reasonable objection, we believe, could be raised to our assertion that the *proviso* could not apply to either of them. Nor is this result altered by the fact, that, instead of making a separate mortgage for each of the two sets of property, the Company chose to make a consolidated mortgage covering both. For the mortgages were, nevertheless, just as independent, as Judge SHARSWOOD says of two covenants, contained in a partnership agreement, in

Lippincott vs. *Low*, 68 Penn., 314,

"as if on separate pieces of paper."

And we have the well considered case of *Thompson vs. Erie Ry. Co.*, 42 How. Pr., 68, to the proposition that a power to mortgage involves a power to make a new mortgage to consolidate prior mortgage indebtedness.

(*d.*) The exemption from alteration of its privilege to mortgage its original lines in Tennessee would survive to the consolidated company of 1869 as long as

its corporate identity remained intact and in spite of its subsequent purchase and absorption of other railroad properties, and the placing of a consolidated mortgage on all the property. This proposition must be true in our case, for it is true in the extreme case of exemption from taxation, a privilege, which is never presumed to be relinquished,

"Unless the intention to relinquish is declared in clear and unambiguous terms."

Tennessee vs. *Whitworth*, 117 U. S., 139, 145, 146.

Central Railroad, &c., Co. vs. *Georgia*, 92 U. S., 665, 674.

Second.—Assuming, however, that the Act of March 24, 1877, could originally have affected all railroad mortgages thereafter made in the State, its mortgage provisions, which are all of the act that concern us on this appeal, were repealed prior to the execution of the mortgage in our case.

For the subsequent General Assembly of 1881, in passing Chapter 9 of the laws of that year, which Act (quoted in full *supra*), in its first section, gives full and unrestricted power to any company to issue bonds secured by mortgage, clearly supersedes and renders inoperative the more limited provision of the Act of March 24, 1877, touching the same specific subject.

The following is the text of the provisions here referred to:

(*Act of March* 24, 1877.)

"SEC. 3. *Be it further enacted*,

That * * * said consolidated company shall have power to * * * issue bonds and dispose of the same in such form and denomination, and bearing such interest as the Board of Directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said consolidated company and of the companies from which it was formed: * * *

Provided further, that no Railroad Company shall have power under this act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this State."

(*Act of March* 15, 1881.)

"SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee*,

That all railroad companies now or hereafter existing under the laws of this State, or of this State and any other State or States, whose original charter of incorporation was granted by the State of Tennessee, be and they are hereby authorized and empowered to issue bonds and secure the payment thereof by mortgage upon their franchises and property in any State or States, or upon any part of such franchises."

A careful inspection of the foregoing provisions clearly indicates to us a well defined intent on the part of the General Assembly of 1881, to repeal the action of the General Assembly of 1877, on the subject of railroad mortgages as contained in this act.

As to the enacting clause, there can be no possible doubt, and the result is the same in the case of the *proviso*, for as our argument will hereinafter show, a proviso is

merely intended to qualify, and does not survive the extinction of, the enacting clause to which it is appended.

That such repeal by implication exists in the State of Tennessee has been specifically held by its Supreme Court, in the cases of

Home Ins. Co. vs. *Taxing District*, 4 Lea, 644; *State* vs. *Gaines*, do., 353,

and the rule is not changed by the constitution of 1870.

Mayor and Aldermen of Knoxville vs. *Lewis*, 12 Lea, 180, 181.

Third.—But conceding for argument both that the mortgage power of the company was not exempt from the effect of subsequent legislation, and that the third *proviso* of the third section of the Act of March 24, 1877, had been in full force at the time of the execution of the consolidated mortgage herein, still the context clearly shows that this *proviso* was not intended to apply to it.

An analysis of this Act of 1877 will show that the intention of the Legislature was to extend the consolidation portion of the Act of Dec. 12, 1871, and the Act of March 12, 1875, so as to authorize a class of corporations to consolidate that were not mentioned by the said Acts.

Under the Act of 1871, entitled

"An Act granting certain powers to existing railroad corporations,"

the power to consolidate with any other railroad corporation whose road should connect with it or intersect it, was confined *to corporations of this State alone.*

The Act of 1875, which is "supplementary" to the Act of 1871 solely upon the subject of "consolidation," extends the right of consolidation to another class of corporations, to wit:

"Railroad companies existing under the joint legislation of this and another State or States, and railroad companies incorporated by this or other State or States whose roads connect with or intersect each other in this or any other State."

The Act of 1877, which is entitled,

"An Act to amend the law in relation to the consolidation of railways,"

extends the right of consolidation to still another class of railroad corporations not embraced either in the Act of 1871 or the Act of 1875, to wit:

"Railroad companies existing by virtue of the statutes of another State, ratified and confirmed by the authority of the State of Tennessee."

The intention of each Act is to authorize consolidations, *yet to be effected*, and the Acts of 1875 and 1877 are merely intended to enlarge the number or classes of corporations that might desire to take the benefit of this legislation, and make consolidations thereunder.

In every section of the Act of 1877 will be found language evidencing the fact that the Legislature intended that that Act, as well as those to which it was supplementary, should have *prospective* force only, from their respective dates.

The proviso of its first section is to the effect that no railroad corporation indebted to the State of Tennessee *shall be entitled* to the benefit of said Acts or of this Act *until* such corporation shall have fully paid off and discharged all of such indebtedness *actually due at the date of such consolidation.*

By the second section, roads authorized to consolidate with each other must connect with or intersect each other, and the terms and conditions of the consolidation shall be agreed upon in writing between such corporations respectively. No such consolidation shall be consummated until it and the terms thereof shall have been approved by a majority of the stockholders of such *consolidating* companies, and the *agreement of consolidation*, together with the evidence of the approval thereof by the stockholders, *shall be filed* in the office of the Secretary of State, and by him recorded; and *no such agreement of consolidation shall be of any force or effect until the consolidating companies shall have paid off* and discharged all indebtedness, if any, actually due

by them, or either of them, to the State of Tennessee *at the date of such consolidation.*

The third section provides the manner in which the *new corporation* shall be organized, and the new company is given power to fix the number of its directors; the number, names and duties of its officers; and power to pass by-laws for the government of the new company and for the management of its affairs: the power to fix theamount of its capital stock, and that it

"shall have power to * * * issue bonds and dispose of the same in such form and denomination, and bearing such interest as the Board of Directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said *consolidated* company and of the companies from which it was formed."

and to do all other acts and things which the said companies *so consolidating*, or either of them, might have done *previous to such consolidation.* The remaining part of this section contains three provisos, the third of which is relied upon by the appellee in this cause, as follows:

> "*Provided*," that no "such consolidated company" shall have greater rights than other companies.
>
> "*Provided further*," that no "such consolidation" shall work any exemption from taxation for "such consolidated company," and that the State shall have power to prevent unjust discrimination in its fares and charges.
>
> "*Provided further*, that no Railroad Company shall have power under this act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property * * * which shall be valid and binding * * * against judgments * * * for damages done to persons and property in the operation of its railroad in this State."

From this analysis of the Act of 1877 it is manifest that the intention of the Act is to authorize *future consolidations*, and not to restrict the powers of corporations already in existence; and the third proviso to the

third section, should be read as limiting only the powers of corporations *formed by consolidation under the Act of 1877.*

Endlich on Interp. of Statutes, § § 184–5–6.

The fact that the words, "such consolidated" are not expressed between "no" and "railroad" in the first line of the last proviso, becomes insignificant in view of the context. For in Tennessee, as Judge REESE says in—

Pillow vs. *Hardeman*, 3 Humph., 538, 541. (Italics ours.)

"The ordinary sense of particular phrases, however well ascertained," has "to yield to the sense and meaning of the *context* and to the *scope* and *purpose* of *the instrument.*"

Fourth.—Not only, therefore, does it appear that prospective force only was intended for this act, but retrospective force can be given to it, because, as Mr. Justice DANIEL says in—

Murray vs. *Gibson*, 15 How. 421, 423.

"As a general rule for the interpretation of statutes, it may be laid down, that they should never be allowed a retroactive operation when this is not required by express command or by necessary and unavoidable implication, especially should this rule of interpretation prevail where the effect and operation of a law are designed, apart from the intrinsic merits of the rights of parties, to restrict the assertion of these rights."

The application of this language to the above act is too evident to need further comment.

Fifth.—Nor without violation of the ordinary use of language can we impute to the *proviso* of the Act of 1877 any other intention than that of the context, which, as above shown, does not refer to our company.

For it is well settled that the ordinary office of a *pro-*

viso is to place some condition or limitation upon the privilege granted or corporation created by an act,

Sedgwick on Construction of Statutes, p. 49, and cases cited.
Potter's Dwarris, Am. Ed., p. 118, do.
Bishop on Written Laws, § 58, do.
Endlich on Interp. of Statutes, § 184, do.

and it is most unusual, if indeed it be possible, for a *proviso* to have a wider scope than the enacting clauses of the act of which it is a part.

Sixth.—In this connection we are not unaware of the language of Mr. Justice FIELD in

Georgia Railroad, etc., Co. vs. *Smith*, 128 U. S., 174, at p. 181, viz.:

"The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

Neither can we deny that this *proviso* of the act of 1877 may have come into existence as an amendment in the manner above suggested, but we do deny that the originator in proposing, or the General Assembly in adopting such amendment, ever intended it to have the effect which a literal construction of its terms when isolated from the context would import.

Evidence that this *proviso* of the Consolidation Act of March 24, 1877, was not intended to apply to any companies but those thereafter to be formed under its terms, lies in the fact that the Reorganization Act, entitled,

"AN ACT AS TO THE SALE OF RAILROADS UNDER MORTGAGE, GRANTING CERTAIN POWERS TO PURCHASERS, AND AUTHORIZING INCORPORATION OF PURCHASERS."

(Acts of 1877-8, Ch. 12, p. 17), "approved" March 16, 1877, or eight days before, contains the same identical "proviso."

Further evidence is furnished by the fact that Chapter 1, § 8 of the Acts of 1873, "approved" Feb. 24, 1873, and entitled:

"An Act to authorize certain railroad companies of this State to issue consolidated or income bonds, and to mortgage their property to secure the same for the purpose of paying off their indebtedness,"

contains in Section 5 a *proviso* expressing the exact construction we contend for in respect of the two provisos above mentioned, its language being:

"Provided no *such mortgages* shall bar any judgment against *such roads* for work or labor done, or damages done to person or property."

Comparing these three provisos, which we believe are the only ones on the subject to be found in the statutes of Tennessee prior to 1881, two conclusions are inevitable:

(*a.*) That neither proviso of 1877 was intended to apply to any company but such as might come under the terms of the act containing it.

This view must be sustained, because otherwise one of these two provisos would be a mere repetition or nullity, a construction which cannot be maintained in the face of the rule that

"every clause and word of a statute is presumed to have been intended to have some force and effect" (Endlich on Interpretation of Statutes, § 265 and cases cited).

(*b.*) That the proviso of 1873 being of earlier date than and *in pari materia* with, the two later provisos should

serve to explain their obvious ambiguity in favor of the construction asserted by the appellants.

Seventh.—A further, and, we believe, conclusive reason which prevents this *proviso* from affecting our mortgage arises from the fact that it is a "statute in derogation of the common law," and as such must be strictly construed.

According to the common law as shown at length under our first point, the lien of the consolidated mortgage was superior to all subsequently accruing liens, including, of course, that of appellee's judgment. But according to the law as changed by the *proviso* in question, the former state of affairs would, in certain cases like ours, be reversed, and the lien of the mortgage would be inferior to that of the judgment.

An unqualified power to mortgage is a privilege highly advantageous to the corporation, and any intervening liens allowed by the State, by just so much, diminish the value of such privilege, and render less marketable the bonds secured by such a mortgage. The amount of diminution in value may in some degree be appreciated when we consider that these bonds under the new state of affairs would be sold subject to the contingency of being partly or wholly shut out by reason of the subsequent recovery of judgments of the favored classes, exceeding in possible amount the actual value of the mortgaged property.

A statute so changing the substantive and common law, should, according to the uniform decisions of both Tennessee and Federal Courts, be strictly construed.

> *Shaw* vs. *Bank*, 101 U. S., 557.
> *Hearn* vs. *Pendleton*, 3 Cold., 399, and cases cited in Endlich on Interpretation of Statutes, § 127, p. 174, *note* 88.

The term,—strict construction, means that a statute can affect no case which the legislature has not *clearly* evinced an intention to include.

> *United States* vs. *Dickson*, 15 Peters, 141, 165,

and certainly this is not true in case of our mortgage, where, as above shown, every intendment of the act points in an opposite direction.

Eighth.—It cannot be successfully argued that the purchase by the company of its foreign lines in 1880 and in 1881 was a consolidation under the Act of 1877, so that the company, by accepting the benefits of the act, must needs also accept its *proviso*.

For, as the Record (p. 4) conclusively shows, the only consolidation to which the East Tennessee, Virginia & Georgia Railroad Company was ever a party was that of the original lines, *and was consummated prior to the Act of December 17, 1869.*

Moreover, the Act of 1877, while giving power to railroad *companies to consolidate together, gives no power for the purchase of* "*railroads*," except to companies amalgamated under its terms.

The Act of December 12, 1871, gives (§ 1) *existing* companies in this State the

"power to acquire by purchase * * * *any railroad* with its franchises belonging to any other railroad corporation."

This subject was amended by an act, "approved," March 20, 1877 (Chap. 20, p. 35), which should not be confounded, however, with the consolidation act now under discussion, and passed March 24, 1877. Under this amendatory Act of March 20, 1877, domestic companies and companies whose corporate existence had been recognized by the State of Tennessee were authorized

"to become purchaser of any railroad sold in this State or any adjoining State under any judicial proceeding in such State or sold by any person or persons natural or corporate, who may have purchased or derived title under or from any such judicial sale"

The same subject was further amended by the Act of March 15, 1881 (Appendix, p. xxix), before referred to as giving power to mortgage the company's foreign lines,

which empowers companies now or hereafter existing under the laws of this State, or of this State and any other State or States to

"acquire by purchase * * * operate, hold or dispose of any railroad or railroads in any State or States."

The *Frazier* opinion is thus mistaken when it says (App. p. xvii) that the Act of 1871 was extended by that of 1877. In fact the latter act borrowed from the Act of 1871 its consolidation provisions, but it made no part of itself, the portion of the act relating to "purchase" of railroad properties. That portion remained intact and unextended till the judicial sale act of March 20, 1877, and the subsequent purchase act of March 15, 1881.

The distinction between consolidation or amalgamations of companies on the one hand and the purchase of a railroad by one company from another company on the other hand, is specifically made in this very Act of December 12, 1871, the first part of which relates to the "purchase of railroads" and is amended as above shown by Acts of March 20, 1877, and March 15, 1881, and the second part of which quite disconnected from the first relates to the "consolidation of companies" and is amended by the Acts of 1875 and March 24, 1877.

The distinction we point out has many times been in this Court with demonstrable clearness in the case of

Memphis Railroad Company vs. *Commissioners*, 112 U. S., 609, 619.

If the foreign lines had been acquired under the Act of March 24, 1877, then the East Tennessee, Virginia & Georgia Railroad Company would have been a new company as many times successively as it purchased railroads in the years 1880, 1881. Moreover, in every such case, as appears in our analysis of the Acts of 1871, 1875 and March 24, 1877, (*supra*) there would have been filed and recorded with the Secretary of State an—

"agreement of consolidation together with the evidence of the approval by the stockholders."

This fact, it was a part of the appellee's case to have made appear in the Court below.

Yet the *Frazier* decision holds in effect that the company did so consolidate under the Act of 1877, for it only justifies the application of this proviso to the company on the ground that (Appendix, p. xxi.)

"it is a condition upon which the power to consolidate and the unlimited power thereafter to execute mortgages is granted."

Ninth.—But suppose this proviso be construed as we contend it should be read (interpolation ours):

"Provided further that no Railroad Company" (hereafter formed by consolidation hereunder) "shall have power under this act or any of the laws of this State."

Then it becomes a legitimate limitation upon the power of a newly consolidated corporation to mortgage its property, and without infringing upon any one of the numerous rules which sustain the foregoing propositions, fails utterly to apply to the mortgage of a corporation like ours.

If our contention, therefore, be correct as to any of our several propositions respecting the construction of or inapplicability to, this mortgage of the act of March 24, 1877, or rather the third *proviso* of the third section thereof, then the third question must be answered in the negative and the judgment below reversed.

III.

The Fourth Question Certified should be Answered in the Negative.

This question is (Record, p. 3):

"IV. Whether the third proviso to the third section of said Act of 24th March, 1877, is valid and constitutional?"

If the construction, placed upon this act by Judge JACKSON and the Supreme Court of Tennessee in the Frazier case, be correct, then we insist that so much of the act as contains the third *proviso* is void for three reasons, viz:

(*a.*) In the first place the *proviso* would contravene, as to the company which the Receiver represents, the 10th section of Article 1 of the Constitution of the United States forbidding any State to

"pass any * * * law impairing the obligation of contracts,"

and in violation of the fourteenth amendment it would result, as to the bondholders secured by the mortgage whom the Trust Company represents, in taking of

"property without due process of law."

For, as previously shown, our charter specifically grants the company an existing power "to mortgage its charter and works" subject only to change "when accepted and adopted unanimously by the president and directors * * * and not otherwise."

There is no proof in the Record of any such acceptance and no pretense will be made by the appellee that such was the case.

This fact also involves a conclusive answer to any contention that a power to mortgage is an ancillary right or matter of general law, and not properly a franchise within the scope of the *Dartmouth College*

case decision. Such a contention we believe to be preposterous, for reasons above given. But were these reasons overcome and conceded, our position would still be impregnable.

For, as in a policy of insurance, an otherwise immaterial statement becomes a warranty, so in a charter which contains a guarantee that amendments shall only be made as aforesaid :

"when the president and directors unanimously agree thereto * * * and not otherwise,"

a matter of general law becomes a special franchise.

It matters not that this legislation does not directly take away the power to mortgage, if it tends in any way to diminish the value of the mortgage lien, that is enough to render it unconstitutional. This principle was announced by Chief Justice MARSHALL, in *McCulloch* vs. *Maryland*, 4 Wheat., 316, when he says (p. 431) :

"The power to tax involves the power to destroy."

That this *proviso* does have such a depreciating tendency we have shown under our previous point, although it is self evident.

(*b.*) In the second place, the *proviso* would contravene the 8th section of the 11th article of the State Constitution of 1870, which, while providing for the amendment of subsequently granted charters, expressly saves from its operation—

"Rights which have become vested."

That the power to mortgage is a "right" we take to be indisputable.

That the right became vested prior to 1870 is shown by the company's acceptance of the Act of February 25, 1869, to which fact the Act of December 17, 1869, bears witness, and as the Record as to both these acts impliedly at least (p. 4) concedes.

(*c.*) In the third place the *proviso* would be unconstitutional as contravening the 17th Section of the 2d Article of the Constitution of Tennessee, which provides that:

"No bill shall become a law which embraces more than one subject, that subject to be embraced in the title."

This language is mandatory and not merely directory, as Judge NICHOLSON observes in *Cannon* vs. ***Mathes***, 8 Heisk, 504, 518, viz.:

"The command is positive that no law shall embrace more than one subject, and is equally positive that that subject *is* to be or *shall* be expressed in the title. To constitute a valid law under this provision, the bill must not embrace one subject alone, but that subject must be embraced in the title."

Now, in the case at bar, while the "consolidation of railways" is the *one* subject of the title, in the body of the act, on the other hand, there are distinctly *two* subjects, one having reference to that indicated in the title, and the second having reference to every railroad "mortgage" authorized by "any of the laws of this State," and changing the common law so as to allow intervening liens to the possible extinction of such mortgage security, as hereinbefore shown in our discussion of the *Buck* case, under proposition "Sixth" of the preceding point.

A very recent case is that of *Ragio* vs. ***The State***, 86 Tenn. (2 Pickle), 272, 273. Here was involved:

"An Act making it a misdemeanor to carry on barbering on Sunday,"

and for the violation of which Ragio had been indicted. The indictment was demurred to, and the demurrer overruled in the Court below.

In its opinion, the Court, by TURNEY, *C. J.*, say (at pp. 274-7):

"The subject in the title is barbering. The subjects in the body of the act are barbering and bath rooms. * * The bill containing the defects suggested did not and could not become a law. This court in *State* vs. *McCann*, 4 Lea, 2, said:

'If an act contains more than one subject, and only one subject is expressed in the title, the whole act is a nullity.'

"This exact declaration was repeated in *Murphy* vs. *State*, 9 Lea, 379. There are at least two other cases to the same effect. We are not able to see how a different interpretation could be given. * * * The judgment is reversed, demurrer sustained, indictment quashed and the accused discharged."

See also the cases of

State ex rel. Gaines vs. *Whitworth*, 8 Lea, 594, at pp. 595–7. *Mayor and Aldermen of Knoxville* vs. *Lewis*, 12 Lea, 180, at pp. 181–2. *Hyman* vs. *State*, 3 Pickle, 109, at p. 111.

Surely if "bath rooms" are not incidental to the subject of "barbering" then the mortgage power of "any railroad company under any act" is not incidental to the subject of consolidation of "certain railroad companies under a certain act."

The object, too, of this constitutional clause, according to the opinion in *Cannon* vs. *Mathes*, *supra*, at p. 521, is

"to prevent surprise or fraud upon the Legislature, by means of provisions in bills of which the titles gave no intimation, and which might, therefore, be overlooked, and carelessly and unintentionally adopted."

But can the title:

"An act to amend the law in relation to the consolidation of railways,"

reasonably be argued to convey any intimation of the existence in the body of the act of a clause prescribing the effect of the mortgage executed by a company formed under "any law,"—which law might be an act of re-

organization, or of original incorporation, as well as of consolidation, to which last the title specifically refers?

To say "yes" to this question is the equivalent of claiming that an act entitled

"an act requiring chattel mortgages to be recorded"

is constructive notice of the fact that "real estate mortgages are likewise required to be recorded" therein.

The construction, therefore, which the appellee would have the court give this *proviso* makes it clearly unconstitutional.

The construction on the contrary for which we contend, and which limits the *proviso* to companies consolidating under the act, makes both the title and the body thereof relate to one and the same subject. For to regulate the mortgage power of companies consolidating under an act is unquestionably a subject incidental and germane to the subject of consolidation of companies, to which the title of the act and its body otherwise relate.

As between two constructions, if indeed the act be susceptible of such, that one should prevail which will allow the act to stand as a *constitutional* exercise of legislative power. For, in the language of Mr. Justice Woods in *Presser* vs. *Illinois*, 116 U. S. 252, at p. 269

"It is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law."

Accordingly, there seems no alternative but to construe the *proviso* as urged by us, and to deny its application to our mortgage.

From what has been said it follows, that even if the third question certified should be answered in the affirmative, the fourth must, nevertheless, be answered in the negative, and the result would still be a reversal of the action of the Circuit Judge in overruling the appellants' demurrers.

The *Frazier* case, it is true, finds no difficulty in reaching a decision favorable to the title of the act, but it seems to place it upon the impossible ground, as above shown, and as the Record demonstrates, that the company consolidated under the Act of 1877. (Appendix, p. xx.) Not only does Judge Lurton, who writes the opinion, go thus far, but he says, as conclusion of the whole matter (App. p. xxiii, italics his):

"It is a proviso *affecting all railroad companies alike, whether they shall thereafter consolidate or not.*"

This last statement, *obviously untenable*, must certainly shake our confidence in the soundness of the opinion in other respects as well.

IV.

The first question certified should be answered in the negative.

This question is (Record, p. 2):

"1.—Whether petitioner's judgment for personal injuries to her deceased husband, is entitled to priority of satisfaction *out of the income of the said receivership*, as a debt which *in equity* is a first charge on the income arising from the operation by the Receiver of the mortgaged premises."

and the record shows (pp. 1 and 2), that appellee's husband was injured after the execution of the mortgage and prior to the time when the railroad went in the hands of the Receiver herein.

A negative answer has been given to this proposition in the Federal Courts, with the exception of the instance out of which the present appeal arose.

The case of the *Central Trust Company of New York* against the *East Tennessee, Virginia and Georgia*

Railroad Company. (*In re Intervening petition of Miller*) Circuit Court for the Northern District of Georgia (30 Fed. Rep., 895), rests on facts precisely similar to those of the case at bar and answers both of the above questions in the negative.

Judge PARDEE and Judge NEUMAN

"having sat * * * on the hearing of this case," concur "both in the reasoning and the conclusions" (p. 898),

and use this language (p. 897. Italics ours):

"General creditors of a Railroad Corporation, which includes those claiming damages for negligence in operating the railway, have never been held as having any privilege on the income of the property, much less on the corpus of the property, but there are many cases to the effect that no such privilege or equity exists. * * * The petitioner's claim against the Railroad Company is for *personal damages growing out of the negligence* of the company's agents more than four years prior to the suit for foreclosure. *Neither on principle nor authority can we adjudge such a claim to be prior in right to the mortgage bondholders.*"

Again in the case of

Davenport vs. *The Receivers of the Alabama and Chattanooga Railroad Company*, 2 Woods, 519, Mr. Justice WOODS employs the following cogent reasoning: (Italics ours)

"The claim is for $3,000 and costs, on a judgment rendered for damages, for the injuries received by Davenport while travelling as a passenger on the Alabama and Chattanooga road when it was run by the Receivers, Rice and Haralson.

The question is, whether such claim can come in as a lien on the fund, superior to the first mortgage in existence, when the right to damages accrued.

"*It is too clear for argument, that if the road had been run by the President and Directors when the injury was sustained, no such claim could have priority.*

"The party would have travelled over the road, taking the risk of the ability of the Company to respond, just as every man who obtains a right or contract does so with

the risk of the ability of the Company to answer to him.'

And again,

"The estate in the hands of the Receiver must bear the loss, but only such estate is liable for the loss, and not the estate of one who holds a paramount lien."

And again the learned Justice continues at page 523,

"*The exercise of power by a Court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append as an incident to running a railroad, a lien for damages that displaces existing contracts.* The party has a right to be paid from the fund remaining after satisfying prior rights. He has a right to be allowed his claim to be paid from an excess remaining."

In the case of *In re Dexterville Manfg. Co. vs. Case, Receiver, etc.*, 4th Fed. Rep., 873, a similar case was under discussion. Here it appeared that, pending the foreclosure of the Green Bay and Minnesota R. R. Co., and while defendant as Receiver was in possession of the same, certain petitioners filed a petition claiming to have sustained damages—

"in the destruction of timber and cranberry marsh along the line of the road by fire alleged to have been set by sparks escaping from defective locomotives" (p. 874).

It further appears

"that one of these fires occurred * * * more than four months before the foreclosure of the mortgages and suit was commenced and before the Receiver was appointed (p. 874).

On this state of the facts, Judge DYER uses this language (italics ours):

"The question whether such claims can be allowed or entertained against him" the Receiver, "or the property which he has in charge for the bondholders, or against

any party other than the railroad company by whose negligence, it is alleged, the loss and damage was occasioned. * * * To sustain the claim in question it is, therefore, necessary that some equity be found in favor of the petitioners and superior to that of the bondholders upon which to base their allowance; and the supposed equity urged is that the fire in question occurred after default on the part of the railroad company in payment of the mortgage debt or interest, etc" (p. 874).

"*To sustain the position taken by the petitioners it must be held that the bondholders at least impliedly assumed liability for the negligence of the Railroad Company, and that by operation of law their mortgage security was subordinated to claims of the character of these. I cannot so hold.* The alleged causes of action accrued after the Company had given mortgages upon all its property which were then subsisting liens and before the Receiver was appointed. *It can make no difference that they accrued after the Company was in default in payment of interest on its bond.* The road was still being operated by the Company, and whatever liability existed must have been one against the Company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. *They are wholly unlike claims for supplies, new equipment, right of way and new construction, or any claims falling legitimately under the head of operating expenses which the Courts sometimes order paid from net earnings in the hands of the Receiver as having equities superior to those of bondholders*" (p. 875).

And the opinion ends thus:

"The demurrer to such parts of the petitions as state causes of action against the Railroad Company accruing prior to the appointment of the Receiver is sustained. And it is not improper to add that this ruling is supported by the practice of the learned Judge of this circuit, who has uniformly disallowed claims against the Receiver of the character of this" (p. 876)

This language is repeated by the same Judge in the case of *Hiles* vs. *Case, Receiver*, 14 Fed. Rep., 141.

In *Central Trust Company* vs. *Wabash, St. L. & P. Ry. Co. (Boutwell and others, intervenors)*, 28 Fed. R., p. 871, which was a case where (*per syllabus*):

"a claim for damages for the loss of property in the course of transportation against a railroad in the hands of Receivers, originated more than three years before the appointment of such Receivers,"

Judge TREAT sitting in equity in the Circuit Court for the Eastern District of Mississippi, uses this language (p. 872, italics ours):

"The effect of this is, that the amount for which the Wabash Company should have responded in 1881 is allowable against the Wabash Corporation as a corporation, and not against the Receivers, or the *funds in their hands earned since their appointment to be made prior in right to the mortgagee.* It is nothing but a debt at large against the corporation and not prior in right to the mortgages."

To the same effect is the recent case of

Thomas vs. *Peoria & R. I. Ry. Co.* (*Western Car Co., intervenor*), 36 Fed. Rep., 808, where, Mr. Justice HARLAN tersely sets forth (pp. 817-19), the cases and the limits within which a Receiver under circumstances similar to those of Mr. Fink in the case at bar, is authorized to pay, out of the *earnings* or out of the *corpus* of the property, claims which have accrued prior to his entering office.

The principle of these decisions seems formerly to have been fully recognized in Tennessee as indicated by the case of

Hopkins vs. *Connell*, 2 Cooper, (Tenn. Ch.) 323, 325.

From these cases it seems to be agreed, and we find no dissenting federal authority to the proposition, that the first question certified should be answered in the negative.

It is true that Judge LURTON disagrees with the foregoing conclusion. In view of the cases cited by us, we

have few comments to make. Certainly Justices Woods and HARLAN, the only members of the Supreme Bench who have decided this question, have agreed with us, and the cases cited against us in the Frazier opinion (App., p. xxiii) in our judgment, *do not sustain* the learned Judge.

V.

The fifth and last question certified should also be in the negative.

This question is (Record, p. 3):

"V.—Whether petitioner, as a general creditor of said defendant railroad company,—and aside from the said act of 27th of March, 1877,—would be entitled to have the *fund disbursed by the Receiver*, from time to time, *under the direction and order of this Court*, restored and the assets marshalled for said petitioner's benefit?"

As to this question, while the facts are certified that the Receiver (Record, p. 4, paragraph Sixth), since his appointment,

"has, under the order and direction of this Court, and *from the receipts* of said East Tennessee, Virginia and Georgia Railroad, and *from moneys received by him from the Treasurer of the said railroad company*, upon his appointment as Receiver, made permanent improvements on said road and paid interest on underlying bonds of dates prior to the mortgage of 15th of June, 1881, to an amount in excess of the said judgment of petitioner;"

Still as previously stated it also appears (*ibid.* p. 4, paragraph "Eighth"), that:

"The amount realized from the said sale of said mortgaged premises on the 25th of May, 1886, was insufficient to pay off in full the said outstanding Mortgage Bonds, and the unpaid coupons thereon."

As a result of this state of affairs it follows that, no matter what disposition has been made by the Receiver of the "receipts" during the Receivership or the "moneys received by him from the Treasurer," the appelee cannot complain, since, as we have shown at length under Points IV. and I. respectively, neither class of these assets could be used to satisfy her judgment, in any event, on account of the prior equity of the bondholders to the same.

As a result of which it follows that the fifth question certified must be answered in the negative, unless the anomalous doctrine enunciated in the Frazier opinion (App., p. xxiii) be sustained, of which result however we have little apprehension.

VI.

On the whole record, therefore, the judgment should be reversed and the demurrer of the appellants sustained.

New York, October 30, 1889.

Respectfully submitted,

EDGAR M. JOHNSON,
Of Counsel for Appellants.

Appendix.

OPINION.

SUPREME COURT OF TENNESSEE.

M. M. BUCK & Co.

vs.

MEMPHIS AND LITTLE ROCK R. R Co., *et al.*

Jackson, April 21st, 1877.

The original bill in this case was filed October 11th, 1872, to enforce the collection of a note given by the Memphis and Little Rock R. R. Company for $4,845 $\frac{23}{100}$, dated May 28th, 1872, due ninety days after date, together with an account for $934.11.

The note as well as account were for articles furnished the company for the use of the road, and are admitted to be due and unpaid.

The Memphis and Little Rock Railroad Company is a corporation operating under a charter from the State of Arkansas, the road extending from Little Rock to Hopefield on bank of the Mississippi river opposite the city of Memphis. It has, however, its office and agencies in the city of Memphis.

It has no corporate existence however in the State of Tennessee. It owns a leasehold of ninety-nine years, obtained from the city of Memphis in certain lands on which it has a depot, with tracks laid for its cars, which are brought over the river by a transfer boat.

The case presented in this aspect of it is, of a foreign railroad corporation having property in this State, which is sought by attachment to be subjected to the debt of complainant in our Courts.

The original bill charges that the Railroad Company had made a deed of trust of date March 1st, 1871, which was registered in Shelby County, June 20th, 1872, to defendant Henry F. Vail, of the city of New York, pur-

porting to convey to him said railroad and equipments in the State of Arkansas, to secure the payment of one million of dollars of second mortgage bonds of $1,000 each, with coupons attached bearing seven per cent. interest, payable semi-annually on 1st of January and July in New York.

This trust deed is averred to be fradulent in law, made with the intent and the effect thereof, being clearly, to hinder and delay the creditors of the corporation in collection of their debts. It is also denied that such a deed was authorized by the charter of the company and by-laws of same.

It is then insisted that, admitting the deed to be valid, it does not, and cannot embrace subsequently acquired property and earnings of the road, cars, engines, and other property, so as to avoid being made liable for complainant's debt. The property sought to be subjected is charged to have been so acquired, and not covered by any previous or subsequent incumbrance.

As evidence sustaining the charge of fraud, it is averred that the trustee never took possession of the road, but it had remained in the hands of the employees and stockholders, and the earnings of the road diverted from and used for other purposes than those mentioned in the trust, by the consent of the trustee, as had been previously agreed and intended.

It is then averred that Goodwin, the treasurer of the company, having an office in Memphis, has in his possession or control money and property belonging to said corporation, the amount not known, and also the Union and Planters' Bank, the officers of which are made parties to the bill.

The ownership of the leasehold mentioned is averred, together with cars on the Tennessee side of the river. An attachment is prayed for against the property mentioned, and the same asked to be sold and proceeds applied to payment of complainant's debt, and for general relief.

We do not deem it necessary to examine all the questions that might be raised on this record, as to the powers of a railroad company in mortgaging its property, whether a special power must be given in the charter or is an incident to the exercise of its general powers, as a proper and usual use of its property in furthering the objects of such a company.

The leading question, we think, in this case is (waiving that of fraud in law or fact for the present) whether the deed of trust attacked, by its terms, when fairly con-

strued, conveys or was intended to convey the property after purchased in Tennessee? We think not, for the following, among other reasons:

The language conveying the property is: "The Company conveys to Henry F. Vail all the lands, franchises, rolling stock, iron rails, cross ties, road bed, right of way and depots and depot buildings, as well as any other species of property owned by this company, or which it may hereafter acquire by purchase or otherwise, *pertaining* to the main line of said road from Memphis to Little Rock, and also to pledge net receipts of said road."

It may be assumed that all the property pertaining to the main line, either then held or subsequently acquired, was conveyed and intended to be conveyed. That the language is broad enough and does include the whole of that complicated idea, known as a railroad made up and complete by road bed, iron trackway, all usual fixtures, cars, engines, &c., but only such as to pertain to the main line from Memphis to Little Rock.

That main line is clearly designated by the charter of the company, Sec. 29, which is as follows: "That said road shall commence on the west bank of the Mississippi river *opposite* the City of Memphis, running in a westerly direction to the town of Little Rock on Arkansas river; to be located in such manner as the Board of Directors may deem most advisable for the interest of the company. This clearly designates what the main line of the road is, fixing its beginning or initial point on the west side of the river, *opposite* the city of Memphis, its terminal point Little Rock."

It would be beyond the words used, and from the surrounding circumstances, equally beyond the intention of the parties to hold this language conveyed, or was intended to convey, property purchased afterwards in the city of Memphis, or which might be acquired in said city. So far as we can see, no such acquisition was contemplated at that time. The main line of the road was clearly fixed by the charter, so that the parties to the Mortgage or Trust Deed knew precisely what was thus designated, and could not misunderstand this qualification to the language of the conveyance.

While after-acquired property may well be mortgaged or conveyed as a security by well settled railroad law, yet it is not necessary in sustaining such a conveyance to hold that a conveyance like this shall stretch beyond its chartered terminus and initial point, and over the Mississippi river, across the line of the State, in order

to include property subsequently acquired, which is not in any fair sense property pertaining to the main line of the road.

We hold, therefore, the real property, depot and buildings, the leasehold and trackways, so far as owned by the Company, and attached in this case, are not embraced in this deed and are subject to complainant's debt.

We here add, that so far as the Company is concerned, it admits in its answer the ownership of the leasehold, depot and grounds and trackways on this side of the river, which seems to have been conveyed to them by the city of Memphis, as per deed in the record.

As to Transfer Steamer attached we need only say, it is shown to have been the property of Mr. Greenlow, and not of the Company, therefore not subject to this attachment

Some cars found on this side of the river and levied on, probably acquired after the conveyance to Vail was made, but of this we have no definite evidence. Be this as it may, the question whether the cars pass under the deed, as appertaining to the main line of road is one free from all difficulty By a large preponderance of authority they would so pass.

They make up part of the equipments of such a road, and for all practical purposes must be held appurtenant to the same, and in this view making up one element of a conveyance of a road, and appurtenances, especially so, where from the conveyance it is seen such road is to be used in aid for in discharging the obligation created by the mortgage, on which it has been given to secure. See *Clay vs. E. T. & Va. R. R. Co., et als.*, 23d How., 117, 23d How. U. S. R., 130, cases cited.

Money was attached originally in the hands of Goodwin, the treasurer of the road. This order, however, was modified at Chambers by the Chancellor, who construed the fiat for the attachment as not intending to interfere with the moneys in the hands of the officers of the Company.

We assume, however, that the money replevined under the order of the Chancellor, by Vail the Trustee, for which bond was given October 12th, 1872, in possession of the Union & Planters Bank, was the money of the company deposited in this bank by the treasurer, and that this money was the earnings of the road, and earned after the deed of trust to Vail of March, 1871.

Taking this to be true, the question is, are such moneys liable to complainant's attachments. The deed

being registered before the commencement of this suit, excludes complainant, unless he can reach the fund on some other ground, provided earnings are embraced in the deed and go by virtue of it.

The net receipts of the road are pledged in this deed for payment of these Second Mortgage Bonds.

The plain meaning of the deed is, that the profits of the road, if any, after discharging other charges upon the earnings, are to be appropriated to the payment of this debt, that is the coupons, for interest as they fall due, and ultimately the principal, the net profits only however are pledged in this deed.

What are net profits? It must be the net products after discharging the expenses of earning such profits.

That is in a case like this, after paying off all legitimate expenses of running the road, keeping it in repair and supplied with the means of earning profits by efficient working in the usual way, then the balance remaining as profits is to be appropriated to meet the debt secured, that is to the payment of the coupons for interest as they fall due. and ultimately the principal. Such debts as we have indicated, are by fair implication provided for by the deed, that is, it is implied they shall be paid by the company, and constitutes a prior charge on the fund.

Complainant's claim is not one arising after the deed was made, and cannot therefore be included in this idea of the deed. It is sought to be enforced as against the earnings of the road, on what is thought to be the decision of this Court in 6 Heiskill, 431, in which an attaching creditor was allowed to take the moneys earned by the road and have them applied to the payment of his debt, on the ground that the Trustee had no right to the earnings, until they became net earnings, and only after ascertaining the net profits, that the lien of the mortgage attached. Some of the reasoning of the Chief Justice in that case, as well as illustrations used by him might support this view. But the case before him, did not call for an opinion as to liability of the gross earnings of a railroad, where the net earnings were pledged, to the satisfaction of debts at large of the company.

In that case the deed expressly provided for paying current expenses of the road and for *the payment of debts of the company.* So that the creditor was but enforcing his right, as against the company, against a fund recognized by the company's deed, as liable to be so appropriated. In one part of the opinion, that is where he discusses this question directly, the Chief Justice puts

it on this ground. He says, by the express terms of the deed, the company have the right, and it is their duty, to meet the current expenses, *to pay the debts*, to repair the road, and to keep it equipped; and for these purposes they are to use the gross receipts or earnings of the road, and then adds, it is only after the net profits have been ascertained (that is thus ascertained) that the lien of the mortgagees attaches (6 Heisk., 431). This is the sound view of the case. But here the antecedent debts of the company are not provided for as in the deed in that case, and by fair construction, only the proper expenses of creating the profits are chargeable upon them.

To say that creditors at large can intercept this fund by attachment and hold the earnings, simply because they attach before the balance is struck, or all charges or expenses paid, so that the net earnings have been actually ascertained, would be to defeat all such deeds, where the company had debts outstanding before the making of the deed.

The theory on which it seems to go in some cases holding this view is that until the earnings reach the hands of the mortgagee, or trustee, in a deed, the right does not pass to them: that is, they pass by delivery, not by virtue of the deed. This is not correct in our view, as laid down in *Pennock* vs. *Coe*, 23d How., p. 130, the after-acquired property is conveyed by the deed, the title to it fixed by this, or not at all.

It passes in cases of the kind now before us, as an incident to the conveyance of the road to be used for profit. When the deed is registered, all parties have notice of its terms and the title to the profits pass by virtue of the deed, as other property conveyed, to be enjoyed, however, as such profits arise, and come into possession of the parties entitled. Before the balance is struck and all charges paid, so as to ascertain the net profits, the right of the trustee or mortgagee, while it is fixed, is subject to such charges, but his right cannot be defeated by a creditor at large coming in and attaching the fund before such an ascertainment, as correctly laid down by Supreme Court of United States in case of *Pennock* vs. *Coe*, 23d How., 130.

The mortgage attached to the future acquisitions as soon as acquired, or from the time they come into existence. The right of the mortgagee or trustee is derived from the deed and does not depend on possession. Without more, we hold the earnings of the road are not

liable to be attached to pay a debt, not created after the deed was made, as in this case, but existed before.

We do not go into a discussion of the question of fraud by which the deed is sought to be declared void for several reasons.

First, we would certainly hesitate to do so in any case when the bill does not purport to make the holders of the bonds, the beneficiaries, parties, nor give any excuse for not doing so.

We have construed the deed and hold it did not embrace the Tennessee property, which we think we may well do, as the trustee may represent the holders so far as to litigate the question of the legal title of the property conveyed, but this is going full as far as we feel authorized to go in this direction.

In addition, however, we may say on this subject, we see plenty of evidence of bad management, possibly a misapplication of the funds arising from these bonds, or the bonds themselves, of this the beneficiaries, however, can only complain, as we think.

We see no satisfactory evidence of fraud in making the deed, especially none that is brought home to the trustee or beneficiaries holding bonds. We do not deem further reference to this question at present necessary. The result is, a decree will be drawn subjecting the property owned by the company, the leasehold, depot, depot buildings and tracks, &c., in the city of Memphis, to payment of complainant's debt. This property will be sold by clerk in sixty days, unless debt paid. Costs of this Court and Court below will come out of the fund, if property sold, if not, be paid by the company.

FREEMAN, *J.*

THE STATE OF TENNESSEE.

I, STOKELY D. HAYS, Clerk of the Supreme Court of said State, for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion pronounced by said Court at its April Term, 1877, in the case of M. M. Buck & Co. against Memphis & Little Rock R. R. Co. *et al.*, as appears of record now on file in my office.

IN TESTIMONY WHEREOF I have hereunto

[SEAL.] set my hand and affixed the seal of the Court, at office, in the city of Jackson, on this, the 24th day of December, A. D., 1883, and of the Independence of the United States the 108th year.

S. D. HAYS,
Clerk.

OPINION.

SUPREME COURT OF TENNESSEE.

(Filed October 28, 1889.)

J. E. FRAZIER

vs.

E. T. V. & G. R. R. Co. and the E. T. V. & G. R'WAY Co.

Some time prior to 1860 there existed two separate railroad corporations, one known as the East Tennesse & Virginia Railroad Company, and the other as the East Tennessee & Georgia Railroad Company. Each owned and was operating an independent line of railway, under charters granted by this State. Under the Internal Improvement Acts of 1851-'2, State bonds to a large amount were loaned to each company, and thus each became largely indebted to the State. By an act passed February 25, 1869, railroad companies so indebted were permitted to consolidate and adopt the name and charter of either of the consolidating companies. Under this act these two corporations consolidated, adopting the name and charter of the East Tennessee & Virginia Railroad. Subsequently, by an act passed December 17, 1869, this consolidation was recognized, and the name of the consolidated company changed to East Tennessee, Virginia & Georgia Railroad Company. On June 15, 1881, this consolidated company executed to the Central Trust Company of New York a mortgage to secure an issue of twenty-two millions of its bonds. This mortgage was known and described as its "Consolidated First Mortgage," and all the corporate property and franchises of the consolidated company, including certain other roads either purchased or built after the consolidation above referred to, were included therein.

On the same date another mortgage known as the "Income Mortgage" was executed to the same Trustee, to secure sixteen and one half millions of bonds known as its "Six per cent. Income and Mortgage bonds." All the corporate property and franchises of the com-

pany were conveyed herein, subject, however, to the "Consolidated First Mortgage," and *in addition the income* of the road was pledged. Default having been made in the payment of interest upon the bonds thus secured, such proceedings were had in the United States Circuit Court for the Eastern Division of Tennessee, as resulted in the sale of the mortgaged property and franchises. The purchasers at the sale were a committee of the holders of the bonds, duly authorized to purchase as trustees for the creditors. This committee bid in the entire corporate property for the sum of ten millions of dollars. Of this sum one hundred thousand dollars were paid in cash, the remainder of the bid being paid in bonds of the company under a scheme agreed upon by the holders of bonds. The title was by deed and decree conveyed to the purchasers. Subsequently these purchasers, by virtue of an act passed March 12th, 1877, "organized as a corporation and adopted the name of the East Tennessee, Virginia and Georgia Railway Company."

After this reorganization the purchased roads were regularly conveyed to the new organization by the persons in whom the legal title stood, for the nominal consideration of ten dollars.

This foreclosure sale occurred May 25th, 1886, and the other proceedings shortly after and during the same year.

Complainant claiming to be a creditor of the old and insolvent corporation files this bill under the provisions of Sections 1492-6, 4168, 4294-5 of Code. The old corporation as well as the new the parties defendant. The bill is filed upon the theory that under the law of this State at the time the foreclosed mortgages were executed, regulating the execution of mortgages by railroads in this State, that the East Tennessee, Virginia and Georgia Railroad Company had no power to make a mortgage of its property in this State, which should be valid as against judgments for timber furnished, or work and labor done, or for injuries to persons or property incurred in the operation of the road in this State; and that the property of the insolvent and debtor corporation in the hands of the reorganized corporation is subject to the demands of all such creditors, the purchasers thereof having no other or higher title than the mortgagees had.

The bill is filed under Sections 4294-5 and 3431 as a creditors' bill to reach and subject assets of an insolvent corporation, and apply them equally to all creditors of

the preferred class. A large number of creditors having judgments unsatisfied, for injuries sustained in the operation of the old road, or work and labor or timber furnished, have come in by petition and been allowed by interlocutory order to become co-complainants in the original bill.

The learned Chancellor upon the whole case decreed as follows:

1. That complainant was a creditor and as such was entitled to judgment and decree against the E. T. V. & G. R. R. Co., and that his claim was for injuries sustained in the operation of said railway in this State after the execution of the foreclosed mortgages and while the road was being operated by the mortgagors.

2. That the E. T. V. & G. R. R. Co., was an insolvent corporation and that since June 1886 had parted with all of its property and franchises and had ceased to perform its functions as a common carrier, and that complainants have no means at law of obtaining satisfaction of their several demands, unless they may compel satisfaction from the property of said corporation in the hands of the new organization.

3. That the mortgages of June, 1881, under which the new company claim title, were subject to the provisions of the Act of March 24, 1877, by which Act said company was prohibited from making any mortgage or creating any lien superior to claims of the class to which complainants belong.

4. That the East Tenn., Virginia & Georgia Railway Company is not an innocent purchaser.

5. That a receiver should be appointed and empowered to take possession and sell a sufficiency of the property of the insolvent debtor corporation, owned by it at the date of the foreclosure sale, and situated in this State, and now in the possession of the reorganized company, to satisfy the several judgments determined in this case to be entitled to priority over the mortgages of June, 1881.

From this decree the East Tennessee, Virginia & Georgia Railway Company have appealed and assigned errors upon each of the several matters so decreed.

The original complainant, Frazier, has likewise appealed from so much of the decree of the Chancellor as held that his claim abated by the sum of $1,491.00.

We will first dispose of the first assignment of errors filed by the Railway Company, which challenges the character of Frazier's claim, and insists that it is neither for damages to his person, or for work and labor, but

for a breach of contract, and that therefore, he is not a creditor of the class entitled to invoke the provisions of the Act of 1877.

Frazier, in January, 1883, was an engineer in the service of the old corporation and was badly injured by the overturning of an engine. On the 9th of August thereafter he entered into a contract with the company for the settlement of his claim for damages thus sustained. This contract is too lengthy to here set out. Its substance and legal effect was, that the company on its part agreed to pay him the sum of $90 per month for five years. He, on his part, agreed to do such work in the shops of the company as he should be called upon to do, and which he might be physically able to do. If any question should arise as to his ability to do the work, then it was agreed that Dr. Deaderick should settle such question, and if he should decide that complainant was able to do the work required, then his payments should be abated for the time so lost. The contract further provides that all his medical bills should be paid by the company, and that the sum of $1,800 should be paid to him as an advance payment upon the contract.

In consideration of the foregoing, Frazier released the company from all liabillty for any damages he might otherwise recover. For several months he was regularly paid the agreed sum of $90 per month. But when the road passed into the hands of a Receiver, he was notified that his name had been dropped from their pay rolls. Thereafter he was paid nothing more. Neither before or after this action of the Receiver was he ever called upon or required to render any service, and for the greater part of the remainder of the period covered by the contract he continued to labor under disabilities so serious as to have made it physically impossible that he should render any service in the shops of the company. After his payments were stopped, it is shown that for a part of the time he engaged himself in the management of a small family grocery, and that the service he was able to render was such as could probably have been procured at $35 per month.

The Chancellor was of opinion that his monthly claim should have been abated to the extent that he had been able to make earnings in this avocation, and accordingly he abated the gross sum due by $1,491. We are of opinion that the sum agreed to be paid complainant under this contract was in liquidation of his claim and right of action for personal injuries. The agreement that he should, if able, render service in their shops, if

called upon, was a mere incident of the settlement, and the sums agreed to be paid him are not for work and labor, but as agreed payments in liquidation of damages to be reduced by the value to them of his services to them in their shops, if he should ever be called upon to so labor and should be physically able. This demand is therefore one for personal injuries. We think it was error to abate his claim by the value of his labor in his own store. He was never called upon to perform any labor for defendant, and was unable if he had been to have rendered service in their shops for any considerable part of the time. He was under no obligation whatever to remain idle. If there was work of a kind which he could do, he was clearly entitled to its fruits, as it was not earned at the loss of his time to defendant. His time and labor belonged to himself, unless he was able to work in their shops and wrongfully refused to so work when called. To save himself and family from want he was compelled in pain and suffering to engage in the the little business he undertook. If defendant had kept its contract with him he would not perhaps have been driven to the necessity he was. It does not lie in the mouth of the defendant to say under these circumstances that it was entitled to time.

The assignment of error as to this matter is sustained and judgment will go for the full amount of the monthly payments in arrear.

We come now to the principal question which involves the right of complainants as judgment creditors, the judgments being mainly for personal injuries sustained in the operation of the road in this State, to satisfaction out of the property of the old corporation in the possession and ownership of the East Tennessee, Virginia and Georgia Railway Company.

We have already stated the title of this company. It is most manifest that the defense of innocent purchasers without notice cannot be sustained. They must stand or fall upon their title as mortgagees. The proceedings in the foreclosure suit are not plead or relied upon in bar of the claim now presented, though a demurrer as well as the answer interpose the defence that the remedy of complainants was against the purchase money. There are two answers to this. The purchase money was never paid save in bonds, except a comparatively small sum necessary to pay costs and counsel fees. Second, the foreclosure proceedings do not undertake to clear the title of the property sold, and no steps seem to have been taken to bring creditors of the class represented

by complainants before the Court. If, therefore, the mortgages under which the reorganized company acquired title were invalid as to the judgments of complainants, we see no difficulty in a Court of Equity following the property and subjecting it in the hands of any but innocent purchasers, to the satisfaction of their prior liabilities. Any liens placed upon the property of the new company are not affected by any decree in this cause in as much as the holders are not parties and are therefore not concluded. We only decide that the *corporation* is not an innocent purchaser, and its assignment of error to this effect is not well taken.

The claim of priority in favor of judgments of complainants' is rested in the bill upon a provision in the Act of March 24, 1877, in the following words:

"And *provided further*, that no railroad company shall have power under this act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this State."

The railway company interposes a number of objections going both to the applicability and constitutionality of this provision, to the mortgages under which they claim title. The first is, that under the charter of the old company, it had power to mortgage, and that this general power conferred in their charter is a contractual right which could not be affected by any subsequent legislation limiting the power conferred. The charter has not been made a part of the transcript, and it is insisted by complainants that it is not such an enactment, being a special charter, as entitles us to take judicial notice of its terms. This charter is not a mere private act. It was granted in 1847, and is published as a public act, with the other public acts of that session (Acts of 1847-'8, p. 195). It has been since more than once referred to in other public acts. Such an act is entitled to judicial notice (*Perry* vs. *N. O. R. R.*, 55 Ala., 413; *Hill* vs. *Brown*, 58 N. H., 93; Wharton on Evidence, see 294).

The fifteenth section of the charter granted to the East Tennessee & Virginia Railroad is the only section relied upon as containing the grant of power to issue bonds and mortgage its property. This section is as follows:

"SEC. 15. The said company may at any time *increase its capital to a sum sufficient to complete* the said road, *and to stock* it with everything necessary to give it a *full operation* and effect, *either* by opening books for *new stock*, or by *selling* new stock, or *by borrowing money on the credit of the company, and on the mortgage of its charter and works;* and the manner in which the same shall be done, and in either case shall be prescribed by the stockholders at a general meeting. And any State, or any citizen, corporation or company of this or any other State or country may subscribe for and hold stock in said company, with all the rights, and subject to all the liabilities of any other stockholder."

The power here conferred is limited to one purpose, that of *completing its road*, and *equipping* it with everything necessary to give it "*full operation.*" This old road was completed and in full operation for perhaps twenty-five years before the execution of the mortgages in question, and it is nowhere pretended in the pleadings or proof that either of these mortgages were executed for the purpose of completing or putting into "full operation," the line of road contemplated and authorized by the charter of the old corporation of the E. T. & V. R. R. The power of a railway corporation to execute a mortgage of its franchises, or of corporate property, essential to its operation, must, by the great weight of authority, be expressly conferred. Such a power is generally implied where the corporation is one strictly private, as a factory or mill. The reason for the distinction is found in the nature of the obligations and duties imposed upon a corporation in many respects a public corporation. Such a corporation cannot without express authority abdicate the functions and duties imposed for public purposes by either a sale or lease. For the same reason it may not make a mortgage, for a foreclosure would bring about a sale and abandonment of its powers and responsibilities. Jones on Railroad Securities, Secs. 1 to 10 inc. *Mallory* vs. *Oil Works*, 86 Tenn., 603; *Thomas* vs. *Railroad Comp.*, 101 U. S., 71.

We are of opinion that the limited power conferred in the charter was not sufficient to authorize the issuance of bonds and execution of mortgage for any other purpose than that of completing and equipping the original lines contemplated and authorized by the charter; and that mortgages executed more than twenty-five years after the completion and equipment of the line of the road authorized by the original charter, and not

purporting or shown to be for any such purpose, or to secure renewal of bonds originally issued for such purpose, will not be presumed in the absence of proof or allegations to have been executed for the purpose named in such charter.

The next objection is that the proviso in the Act of 1877 is obnoxious to Sec. 17, Article II of the State Constitution, which provides that "no bill shall become a law which embraces more than one subject, that subject to be embraced in the title."

The title of the Act of March 24, 1877, is, "An Act to amend the law in relation to the consolidation of Railways."

The first section amends the Acts of December 12, 1871, and March 12, 1875, by extending those acts to all railroad corporations "now existing, or hereafter to be created in this State, whether under a general or special law or laws, or by virtue of statutes of any other State, ratified and confirmed by the authority of the State of Tennessee."

The second section authorizes any corporation existing or hereafter created under the laws of this State, or any other State, ratified by this, to consolidate itself with any other railroad whose lines shall connect with or intersect the road of such corporation desiring consolidation.

The third section defines the right and powers of the consolidated roads. Among other powers conferred upon the consolidated companies is that of issuing bonds, and to secure same by a mortgage upon its property and franchises.

Three *provisos* are included in this third section. The first declares that "nothing in this Act shall be understood or construed to give or to transfer to or confer upon, *any such consolidated company, or person operating such consolidation of railroads*, as provided for in this Act *or in any other law of this* State, any franchise, right or immunity or exemption not now granted by the laws of this State to the railway companies which may form part of such consolidated company." The two following provisos and the concluding sections are as follows:

"*Provided further*, that no exemption from taxation, under the revenue laws of this State, of railroad property and franchises and capital stock thereon, contained in railway charters or other railway law of this State, shall *be by this Act, or any other law of this State providing for such* consolidation, transferred to or

conferred upon such consolidated company, or the property and franchises and capital stock therein, of such consolidation of railroads, or of the property appertaining thereto and used in the operation hereof; *and that the State shall have the power, by appropriate legislation, to prevent unjust discriminations against, and extortions for, freights and passage over all railroads in this State*; and provided further, that no railroad company shall have power under this act of any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished, and work, and labor done on, or for damages done to persons and property in the operation of its railroad in this State."

SEC. 4. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

The Act of 1871 amended and extended by the act under consideration, was an act entitled "An Act granting certain powers to existing railroad corporations." This act empowered any *existing* railroad corporation *of this State* to acquire by purchase or other contract, any other railroad. Second: the right to hold, use and operate any road theretofore purchased or acquired. Third: the right to consolidate with any other connecting or intersecting road. Fourth: it gave power to *any existing* railroad corporation to *issue bonds for any purpose within scope of its powers, or to meet* indebtedness already incurred, and *power to mortgage its property* and franchises to secure such bonds.

By a proviso the Act was declared not to operate so as to affect any lien in favor of the State or creditors of such corporations, and that such consolidation shall not be complete until approval of majority of stockholders. By the second section the companies indebted to the State on account of State aid, are excluded from the benefits of this Act until they should have paid off such indebtedness.

The Act of March 12, 1875, so amended this Act of 1871 as to extend it to all consolidations existing under *the joint* legislation of *this* and *another* State or States, and companies incorporated by another State where roads connect or intersect in this or another State.

Does this Act of 1877 contain more than one subject within the meaning of the constitutional enactment that no act shall become a law which contains more than one

subject? The leading case in this State construing this clause of our constitution is that of *Cannon* vs. *Mathes*, 8 Heisk., 504. The case arose upon the construction of an act entitled "An Act to fix the *State tax on property*," the fourth section of which increased the State tax on *privileges* fifty per cent. upon the existing basis.

Chief Justice Nicholson, in delivering the opinion of the Court, quoted with approval the view of Judge Cooley as to the purpose of the clause in question as follows: "That the general purpose is accomplished when a law has but one general object, which is fairly indicated by its title." To require every end and means necessary or convenient for the accomplishment of the general object, to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible." He adds: "The generality of a title is no objection to it so long as it is not made to cover legislation incongruous in itself and which by no fair intendment can be considered as having a necessary or proper connection. "The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title defining it." The learned Chief Justice then concludes by saying: "We concur in these general views as sound and practical and by them the validity of the act in question must be tested."

The Court held in the case then under consideration, that an examination of the different sections of the Act, indicated that the general subject of the Act was State revenue, and that a tax upon privileges was germane to the subject of a tax on property. Concerning the title of the Act, the Court, after determining that the object of the constitutional provisions concerning the title of Acts was to prevent surprises or fraud upon the Legislature, by means of provisions in bills of which the title gave no intimation, and which might therefore be overlooked, and carelessly or unintentionally adopted, laid down the rule for the construction of this clause as to the titles or bills to be: "*That any provision of the Act directly or indirectly relating to the subject expressed in the title and having a natural connection therewith, and not foreign thereto should be held embraced in it.*" This liberal rule of construction finds illustration in a number of cases by this Court. The case of *Morell* vs. *Fickle*, 3 Lea, 79, is in point: An Act entitled "An Act to

establish a Chancery and Law Court at Bristol in the county of Sullivan," was held to embrace the establishment of separate Chancery and Circuit Courts at Bristol, and that the establishment of two separate Courts constituted but one subject, that subject being the establishment of such additional Courts for Sullivan County as were needed, and this subject was sufficiently indicated by the title. In *State* vs. *McConnell*, 3 Lea, 333, it was held that an Act entitled "An Act to create and establish the sixteenth judicial Circuit in this State," which detached the county of Trousdale from the seventh Circuit and attached it to the fifth Circuit, was valid. This conclusion Judge Cooper put upon the solid ground that "the establishment of a new Circuit in a State already divided into judicial Circuits, must necessarily require some change in the Circuits previously established, and such change may well be considered germane to the subject and embraced in a caption embodying the general object."

In the case of *Luehrman* vs. *Taxing Dist.*, 2 Lea, 428, An Act entitled "An Act to repeal the charters of certain municipal corporations and to remand the territory and inhabitants thereof to the government of the State," was held to embrace a provision turning the corporate property of such municipalities over to the State to remain public property for the uses to which it had hitherto been applied. So, in the same case, it was held that an Act entitled "An Act to establish taxing districts in this State, and to provide the means of local government for the same," was valid, and embraced but one subject sufficiently indicated by the title, although the Act granted municipal franchises to the communities within the limits of the taxing districts, and gave to the corporations thus created all the legislative, judicial and police powers of an incorporated city, and contained specifications of offenses against the district, with penalties and punishments.

The learned counsel have, in argument, pressed upon us the case of *Ragio* vs. *State*, 2 Pickle, seeming to find in it some principle of construction hostile to that laid down in *Cannon* vs. *Mathes*. That case does not contain any rule or principle for the construction of the constitutional clause in question in any way antagonistic to the well settled doctrine heretofore frequently announced by this Court. In the ascertainment of the general subject of an act this Court must look to the provisions of the particular act under considera-

tion. If, upon our knowledge of affairs, the act seems to contain matters not germane but incongruous, we must*

In that case the title was exceedingly restrictive, and implied legislation closing only barber shops on Sunday. Upon the facts as they appeared in that case, we thought that there was no necessary connection between barbering and keeping bath rooms. Both might have been prohibited in an act under a title broad enough to comprehend the two things. We, therefore, held that the subject of the Act, as indicated by the title, was the prohibition of barbering on Sunday, and that the closing of bath rooms was not germane to such a title. The two occupations not being necessarily so connected as to be embraced under the one head of barbering. The subjects of legislation are infinite. The determination as to whether the several provisions of an Act are congruous and germane become largely a question of fact.

Particular decisions cannot often be controlling in determination of subsequent cases arising out of this constitutional provision. Cases will only serve as illustrations of the application of the liberal rule of construction adopted in Cannon *vs.* Mathes, and frequently approved in subsequent cases. The Ragio case upon its facts was rightly decided, and no rule of decision is laid down in that case, or is to be drawn from the decision which in any way conflicts with the earlier cases on the same subject.

Let us test the constitutionality of the Act of 1877 by the principles so clearly announced by Chief Justice Nicholson.

The object of the Act is to *regulate and define the terms upon which the State was willing to confer upon railroad corporations the power to consolidate*, and to define the powers of such consolidated companies. We have already seen that a railway corporation may not without express authority abdicate its functions and duties, either by a sale or lease, or mortgage. A fortiori it may not lose its own identity by suffering consolidation with another. It would, therefore, seem to need no support of argument, that when the State by legislation undertook to confer upon all railroad corporations the power to absorb another, or to suffer an absorption by consolidation, it might well couple the grant of so extraordinary a power with the condition or proviso, that the corporations so empowered to consolidate should not

* So in original.

have power, before or after such consolidation, to make any mortgage or create any lien, which should affect the class of creditors to which complainants belong. This provision seems to be directly connected with the subject of consolidation, in that it is a condition upon which the power to consolidate and the unlimited power thereafter to execute mortgages, is granted. The subject of the act is sufficiently indicated by its caption even under a more rigid construction of the constitutional clause on this matter, than the well settled rule would require. If the title of this act had been, "An Act defining the terms and conditions upon which the power to consolidate is granted to all railroad corporations, and defining the powers of consolidated companies," it would be hardly more explicit than the title of this act, which purports to be an act amending the whole law on the subject of consolidations.

Now, if in the act with the supposed title, the first section had provided, "that no railroad company shall have power to make any mortgage or create any lien which should be superior to judgments for timbers furnished, or work and labor done, or injuries to persons or property;" and the second section: "that all such corporations should have power to consolidate, &c.," we would then have an act which by the most rigid construction would contain but one subject, and that subject distinctly indicated by the title. Yet any fair construction of the act as actually worded and its title as written, brings us to the same result.

The proviso is germane to the subject of consolidation, and the title sufficient indication of this subject to prevent surprise or fraud, or the unintentional adoption of the act in ignorance of this provision.

It is next insisted that this limitation upon the power to mortgage contained in the Act of 1877, is repealed by the Act of March 15, 1881. This latter act confers the power to mortgage in very broad terms, and is extended to all railroad companies existing under the laws of this or another State, and to all companies which might thereafter be created. The act contains no repealing provisions, and in no way refers to any former act upon this subject. It does not therefore in terms undertake to repeal any former legislation. Repeals by implication are not favored. An act will never be held to repeal by implication another act, unless it clearly appears that the two acts cannot stand together. The repug-

nancy between the two acts must be plain and unavoidable.

Hockaday vs. *Wilson*, 1 Head, 114.
Buchanan vs. *Robinson*, 3 Bax., 152.
Home Ins. Co. vs. *Taxing Dist.*, 4 Lea, 644.

The Act of 1877 contains the proviso in favor of what may fairly be called the claims arising from operation of the railway. The Act of 1881 does not contain it. This proviso in favor of operating expenses and damages for personal injuries is not an uncommon or an unusual one in this State. It first appears in our Legislation in the Act of February 19th, 1873. This was an act entitled "an Act to authorize certain railroad companies to issue consolidated or income bonds and to mortgage their property to secure same for the paying off their indebtedness." By the third section power is given to any railroad company in the State owing outstanding floating debts, to issue bonds to be known as "Income bonds" for an amount sufficient to pay off such indebtedness, and to secure same by a mortgage of its "rents and profits" and all of its other property. This is perhaps the first general legislation expressly authorizing a mortgage of the *income* of railroads, and this power is conferred upon the condition that "*no such mortgages shall bar any judgments against such roads for work or labor or damages to persons or property.*" Acts of 1873, page ——.

Thus we see that it was the clear purpose of the legislature that the power to mortgage income should be coupled with the proviso that claims of the character presented by complainants should not be affected. Again by the Act of 1877, Ch. XII., p. 17, being an act authorizing purchasers at a foreclosure sale of a railroad to organize themselves into a corporation and settling the power of such reorganized company, the same proviso is repeated and in such broad terms as to indicate the purpose of the legislature that this disability should apply *not only to companies so reorganized, thereunder, but that no act authorizing mortgages should be held as authorizing a mortgage or lien which should affect such claims.*

Claims of the class represented by complainants are for the most part exceedingly meritorious as against creditors by bond and mortgage, for the reason that such claims arise from the necessary operation of the road while in the hands of the mortgagor by agreement with the

mortgagee. Possession with the right to operate and receive the income, it would seem, should involve the right and duty to apply such income primarily to operating expenses. Without this is done, there can be no operation of the road by the debtor corporation and no payments of interest to the mortgagee. Hence it would seem that a mortgage upon a going railroad to secure a debt to mature at a distant date, whereby the mortgagor is left in possession, would contemplate, even where the income is mortgaged, that the operating expenses including damages incidental to such operation, should be a first charge upon such income and that only the income after the payment of all such charges should pass or be applicable to payment of mortgage debt. In such case if income was applied to payment of mortgage debt or interest, and operating expenses were left unpaid, it would follow, that creditors of the latter class ought to be allowed to marshal the assets and receive satisfaction out of the corpus, to the extent that income had been diverted from payment of operating expenses. *Clay* vs. *E. T. & V. R. R. Co.*,6 Heisk., 421. *Fosdick* vs. *Schall*, 99 U. S., 356. *Burnham* vs. *Bowen*, 111 U. S., 776. *Gilman vs. I. & M. Tel. Co.*, 91 U. S., 603, *Galveston R. R. Co.* vs. *Cowdrey*, 11 Wall., 489; *Parkhurst* vs. *R. R. Comp.*, 19 Md., 147. *Ellis* vs. *Boston R. R.*, 107 Mass., 1.

It is unnecessary, however, to decide that such claims would be entitled to priority of satisfaction out of income. The state of the pleadings do not perhaps raise this, and it is unnecessary in the view we have of the statute. We only allude to this equitable principle in connection with its repeated expression in our legislation prior to the Act of 1881, that we may in this light ascertain whether there is such repugnancy between the Act of 1881 and that of 1877, as to indicate a legislative intent that the former provisions should by the latter be abrogated. This intent we do not see, and the repugnancy is not obvious.

The two acts may stand together and in such case it is our duty to so decide.

The argument that the proviso in the Act of 1877, was intended to apply only to such consolidations as should thereafter occur is practically disposed of by the view we have all ready announced as to the true construction of that act. If the view we have taken is correct as to the meaning of that Act, then it is a proviso affecting *all railroad companies alike whether they shall thereafter consolidate or not.*

It is unnecessary to determine whether the provisions of the Acts of February 19, 1873, and that of March 16, 1877, limiting the power of railroad corporations with respect to their power of mortgaging property, do not as effectually operate to give superiority to the claims of creditors of the class protected by the subsequent Act of March 24, 1877. It is enough to decide, as we do, that the proviso of the Act of March 24, 1877, is a valid and constitutional limitation upon the power of the E. T., V. & G. R. R. Company, to mortgage its property in this State; and that complainants are entitled to the relief they seek against the property of that corporation in this State, now in the custody and control and ownership of the reorganized corporation.

In view of the well known fact that railroads are now for the most part built with bonds, and operated largely for the benefit of such creditors, the legislation whereby the debts and liabilities created by the mortgagor in the course of this operation as operating expenses are secured as against such bonds, is salutary in a high degree, and rests upon principles of unquestioned equity and right. The decree of the Chancellor will be affirmed, save as modified herein.

LURTON, J.

Filed October 28th, 1889.

THOS. C. LATIMORE,
Clerk.

ACTS OF 1871, CH. 69, P. 59.

"Approved" December 12, 1871.

"AN ACT GRANTING CERTAIN POWERS TO EXISTING RAILROAD CORPORATIONS."

"SECTION 1. Be it enacted by the General Assembly, of the State of Tennessee, *that every existing railroad corporation in this State, whether created under a general or a special law, shall have the right and the power to acquire by purchase, or other lawful con-*

tract, and shall have, hold, use and operate any railroad with its franchises belonging to any other railroad corporation; and likewise to have hold, use and operate any such railroad with its franchises which it may have heretofore purchased or acquired; and also the power to borrow money and to issue its bonds therefor or for any other indebtedness or liability which it may incur or have incurred in the exercise of its lawful purposes, and to secure the payment of such bonds, with the interest thereon, by a mortgage of the whole or any part of its railroad and equipments and other property franchises containing such provisions as its directors shall approve; *and also the power to consolidate* itself with any other railroad corporation whose road shall connect with or intersect the road of such existing railroad corporation or any branch thereof, and so to consolidate itself upon such terms and conditions and under such corporate name as shall be agreed upon in writing between such corporations respectively: *Provided*, That nothing herein contained shall affect or impair in any way, any mortgage, right, lien or priority of the State of Tennessee, or the rights of any creditors of such corporations; and that no such consolidation shall be consummated, or be complete, until it and the terms and conditions thereof shall have been approved by a majority of the stockholders of such consolidating companies respectively; and *provided further*, that the agreement for such consolidation, together with the evidence of the approval thereof by such stockholders, shall be filed in the office of the Secretary of State.

"SEC. 2. *Be it further enacted*, That no Railroad incorporation indebted to the State of Tennessee, on account of its bonds issued to such road in aid of its construction, shall be entitled to the benefits of this Act until such road shall have fully paid off and discharged such indebtedness; *Provided*, that this section shall not have the effect to impair or repeal any Act passed by this General Assembly, but the same shall apply alone to the provisions of this Act. And that this Act shall take effect from and after its passage, the public welfare requiring it.

ACTS OF 1875, CH. 51, p. 48.

"Approved" March 12th, 1875.

"AN ACT RELATING TO CONSOLIDATION OF RAILROAD COMPANIES, SUPPLEMENTARY TO THE ACT APPROVED THE 12TH DAY OF DECEMBER, A. D. 1871, ENTITLED 'AN ACT GRANTING CERTAIN POWERS TO EXISTING RAILROAD CORPORATIONS.'

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Act of the General Assembly of this State, approved the 12th day of December, A. D. 1871, entitled 'An Act granting certain powers to existing railroad corporations,' shall extend and apply to *consolidations* between railroad companies existing under the joint legislation of this and another State or States, and railroad companies incorporated by this, or another or other State or States, whose roads connect with, or intersect each other in this or any other State, and the said Act shall be so construed; and all such consolidations heretofore made are hereby ratified and confirmed, notwithstanding the former companies may have been indebted to this State, as set forth in the second Section of the Act, to which this is a supplement; *Provided*, however, that all indebtedness actually due, and existing at the date of such consolidation, shall have been heretofore paid, or shall be paid in full, within sixty (60) days from the date of this enactment; and *Provided further*, that nothing in this Act shall, in any way, affect or impair any mortgage, right, lien or other claim of the State of Tennessee; but such mortgage, right, lien or other claim shall continue unimpaired until it is discharged under the provisions of this or the original Act.

"SEC. 2. *Be it further enacted*, that nothing in this Act shall be construed to give any right or rights of way in, through or over any territory, county, district or municipality not heretofore given by legislative Act, and is this intended to reserve any cession of such right, not revoking any hitherto given by general law, and to express in words that none such is hereby given.

"SEC. 3. *Be it further enacted*, That nothing in this Act shall be so construed as to prevent taxing railroads by any law hereafter taxing railroads.

"SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it."

ACTS OF 1877, CH. 72, P. 92.

"Approved" March 24, 1877.

"AN ACT TO AMEND THE LAW IN RELATION TO THE CONSOLIDATION OF RAILWAYS.

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the Act of the General Assembly of this State as to *consolidation* of railroads, approved the first day of December, 1871, and the Act of the General Assembly of this State, approved March 12, 1875, entitled 'An Act relating to *Consolidation* of Railroad Companies,' supplementary to the Act approved the 12th day of December, 1871 (page 59, Acts 1871), entitled 'An Act granting certain powers to existing railroad companies,' shall extend and apply to all railroad corporations now existing or hereafter to be created in this State, whether under a general or special law or laws, or by virtue of statutes of any other State, ratified and confirmed by the authority of the State of Tennessee: *provided*, that no railroad corporation indebted to the State of Tennessee shall be entitled to the benefit of said Acts or of this Act, until such corporation shall have fully paid off and discharged all such indebtedness actually due at the date of such *consolidation*.

"SEC. 2. *Be it further enacted*, That any Railroad Corporation existing, or which may hereafter exist in this State, whether created under a general or special law, or existing by virtue of charter or law of this State or of any other State, ratified by this State, and authorized to maintain and operate a Railroad within this State, shall have the right and power to *consolidate* itself with any other Railroad Corporation whose road shall *connect with or intersect the road of* such Railroad Corporation, or any branch thereof; upon such terms and conditions, and under such corporate name as shall be agreed upon in writing between such corporations respectively. *Provided*, That nothing herein contained shall affect or impair in any way any mortgage, right, lien, or claim of the State of Tennessee, or the rights of any creditor of such corporations, and that no such *consolidation* shall be consummated or be completed until it and the terms thereof shall have been approved by a majority of stockholders of such *consolidating* companies, respectively; *and provided further*, that the agreement of such *consolidation*, together with the evidence of the approval thereof by such stockholders, shall be filed in

the office of the Secretary of State and by him recorded; *and provided further*, that such agreement of *consolidation* shall not be of any force or effect until said Railroad Company or Companies shall have paid off and discharged all indebtedness, if any, actually due by them or either of them to the State of Tennessee at the date of such *consolidation*.

"Sec. 3. *Be it further enacted*, That the said corporation so formed by the *consolidation* of two or more railroad corporations, as aforesaid, shall have, possess and exercise, all the rights, powers, privileges, immunities, and franchises, and be subject to all the duties and obligations, (not inconsistent with the provisions of this Act) conferred and imposed by the laws of this State upon such companies so *consolidating*, or either of them. And *said consolidated company shall have power to* fix the number of its directors and the time of their election; the number, names and duties of its officers; to pass by-laws for the government of the company, and the management of its affairs; to fix the amount of its capital stock, which shall be divided into shares of $100 each, and issue bonds and dispose of the same in such form and denomination, and bearing such interest as the Board of Directors may determine, and to secure the payment thereof by mortgage of every and all the property and franchises of said *consolidated* company and of the companies from which it was formed; and to do all other acts and things which the said companies, so *consolidating*, or either of them, might have done previous to such *consolidation; Provided*, That nothing in this Act shall be understood or construed to give or to transfer to, or confer upon, any *such consolidated company*, or company or person operating such consolidation of railroads, as provided for in this Act, or in any other law of this State, any franchise, right, power, immunity or exemption not now granted by the laws of this State to the Railway Companies which may form part of such consolidated company. *Provided further*, that no exemption from taxation under the revenue laws of this State, of railroad property and franchises, and capital stock thereon, contained in railway charters or other railway law of this State, shall be by this act, or any other law of this State providing for such *consolidation*, transferred to or conferred upon *such consolidated company*, or the property and franchises and capital stock therein, of such *consolidation* of railroads, or of the property appertaining thereto and used in the operation thereof; and that the State shall have the power,

by appropriate legislation, to prevent unjust discriminations against, and extortions for, freights and passage over all railroads in this State; and *provided further, that no Railroad Company shall have power under this act or any of the laws of this State, to give or create any mortgage or other kind of lien on its railway property in this State, which shall be valid and binding against judgments and decrees and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this State.*

"SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it."

ACTS OF 1881, CH. 9, P. 10.

"Approved" March 15, 1881.

"AN ACT CONCERNING THE POWERS OF RAILROAD COMPANIES NOW OR HEREAFTER EXISTING UNDER THE LAWS OF THIS STATE, OR OF THIS STATE AND ANY OTHER STATE OR STATES, AND WHOSE ORIGINAL CHARTER OF INCORPORATION WAS GRANTED BY THE STATE OF TENNESSEE.

"SEC. 1. *Be it enacted by the General Assembly of the State of Tennessee, That all railroad companies now or hereafter existing under the laws of this State, or of this State and any other State or States, whose original charter of incorporation was granted by the State of Tennessee, be and they are hereby authorized and empowered to issue bonds, and secure the payment thereof by mortgage upon their franchises and property, in any State or States*, or upon any part of such franchises and property, or to issue income or debenture bonds, and such guaranteed, preferred and common stock as may be determined upon by their stockholders; *Provided*, that the same be approved by the votes of the holders of three-fourths in amount of the entire stock of said company at a regular or called meeting of the stockholders of said company; *And provided further*, that sixty days' notice be given in a Memphis, Knoxville, and Nashville daily newspaper of the time, place, and purpose of the meeting.

"SEC. 2. That all railroad companies now or hereafter existing under the laws of this State, or of this State and any other State or States, be and they are hereby authorized and empowered to build, lease or let, acquire by purchase, lease or otherwise, and operate, hold, or dispose of any railroad or railroads in any State or States, or any parts or portions of any such railroad or railroads, and the distribution thereof, as may be determined upon by their stockholders, and to acquire by purchase or otherwise, and hold or dispose of any bonds or shares of the capital stock of any railroad company or companies in any State or States, and to endorse and guarantee the bonds of any railroad company or companies in any State or States, and whose original charter of incorporation was granted by the State of Tennessee; *Provided*, that the same be approved by the votes of the holders of three-fourths in amount of the entire stock of said company, at a regular or called meeting of the stockholders of said company; *And provided further*, that sixty days' notice be given in a Memphis, Knoxville, and Nashville daily newspaper of the time, place and purpose of the meeting.

"SEC. 3. This act shall take effect immediately, as the public welfare requires it."

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

IN EQUITY, No. 71.

THE CENTRAL TRUST CO., OF NEW YORK,
AND HENRY FINK, RECEIVER, *Appellants*,
VS.
MRS. M. H. C. BACON.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR APPELLEE.

HENRY H. INGERSOLL,
of Counsel.

IN THE

Supreme Court of the United States.

THE CENTRAL TRUST CO., OF NEW YORK,
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VS.

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APPEAL FROM CIRCUIT COURT FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR APPELLEE.

First General Law.

Accepting the arrangement of certified questions, adopted in the brief of appellant, the first, fourth and fifth heads of argument of counsel for appellant (the second, first and fifth of the certified questions), are so closely connected as to permit, and even require discussion together. The essential question is: Has a *general creditor* of a mortgaged railway, whose claim accrued after execution of the mortgage but pending possession of the mortgagor-company and operation by it, a prior and superior right of satisfaction to the mortgagee, *by general law and independently of statute?* The second question is: If such prior and superior right of satisfaction exists, is it a lien or charge upon the earnings of the mortgaged property? While the fifth question asks, alternatively: Is such prior right of satisfaction merely an equity to be made effective by marshaling assets? The first

question (fourth head of appellants' argument), asks: Conceding the claim of *general creditors* to be superior, is the claim of a judgment-creditor for compensation for personal injuries received in the operation of the mortgaged road, accrued after execution of the mortgage, such a claim as is contemplated by the rule?

If there were any practical difference between a superior lien and an equity of prior satisfaction, it is immaterial in this case as the fund is impounded and remains subject to the court's orders. So that three questions are reduced to two:

FIRST. Where a mortgagee of all property of a railway company, owned and to be acquired, permits the mortgagor-company to remain in the possession and operation of the road, must one who becomes a general creditor of the mortgagor-company, pending such mortgagor's possession and operation, be paid before the mortgagee?

SECOND. If the affirmative of the question is the rule, is a claimant for compensation for personal injuries within the contemplation and protection of the rule?

The questions are of transcendent importance. At the date of the last General Census, there were in the United States:

(1.) 120 companies having operating expenses over gross income, aggregating the amount of	$1,427,581
(2.) 176 companies having fixed charges over entire gross incomes, amounting in total to	13,286,921
(3.) 31 companies illegally declaring dividends in the absence of net earnings	529,974
	$15,244,476

Showing a total of 327 companies with an annual deficit of $15,244,476, which had already passed or were liable any instant to pass into the hands of receivers. (Compendium of Tenth Census,

Part 2, p. 1264–5.) Of the 1165 railway companies in the United States there were only 623 which earned a net income. (Ib. 1264.) We have remaining 542 companies, operating thousands of miles of road, and incurring annually millions of liabilities, which have no net income after payment of fixed charges. In the necessary course of modern business the public is forced to advance money upon the promises, part with property upon the undertakings, and entrust persons and goods to the care and custody of these mortgaged and insolvent railways. It is a question of gravest concern whether the public possesses no other security for payment or compensation than reliance upon the moral obligations of the companies officers; and whether, if a receiver be appointed (as is often the case in pursuance of a plan long secretly contemplated and covertly prepared), those holding the current, floating or general obligations of the mortgagor, contracted when they were ignorant alike of the conditions and purposes of the company, must be left equally penniless and remediless, while the mortgagee, who suffered the mortgagor to remain in possession and operation of the road as an owner, and whose security has been preserved and enhanced by the general creditors' fares and freights, takes everything; and, furthermore, when it is considered that the conflicts and contrarieties of judicial opinion upon this question are as vast and varied as the interests involved, its transcendent importance becomes manifest, and the public expediency of its definite determination by this court of pre-eminent authority is made apparent.

Appellants' counsel assumes that the entire subject is embraced and concluded by the unreported opinion of the Supreme Court of Tennessee in Buck *vs.* Memphis & Little Rock R. R. Co., and by the holding of His Honor, MR. JUSTICE WOODS, at Circuit, in the case of Davenport *vs.* Receivers of Alabama & Chattanooga R. R. Co., 2 Woods, 519. To the contrary, the subject involved has probably evoked more frequent and radical variances of judicial opinion than any other like topic in the range of jurisprudence. Not only have courts of eminent learning differed from each other; but the same court has at different times declared contradictory doctrines. If Buck *vs.* Railroad Company, (*supra*) held, as insisted, that the lien of a railway mortgage attached to

all subsequent earnings as soon as earned, it would be in open conflict with the opinion of CHIEF JUSTICE NICHOLSON in Clay *vs.* E. Tenn., Va. & Ga. Railroad Co., 6 Heisk., 421, to the effect that such lien only holds the net surplus after payment of operating expenses. Nothing could more forcibly illustrate the judicial conflict presented by investigation of relevant decisions than the fact that *this* pre-eminently learned and conservative Court has, at different times, declared and applied apparently different and inconsistent rules upon this subject. It is difficult, if not impossible, to reconcile the decision in Dunham *vs.* Cincinnati, Peru & Chicago R. R. Co., 1 Wall., 254, with the holding in Miltenberger *vs.* R. R. Co., 106 U. S., 286, or either case with the opinions of CHIEF JUSTICE WAITE, in Fosdick *vs.* Schall, 99 U. S., 235, and Burnham *vs.* Bowen, 111 U. S., 776. So important a question, and one upon which the greatest and most learned judges have differed, is not to be lightly dismissed by citation of a single *unreported opinion* of a single court, even did Buck *vs.* R. R. Co. support appellants' contention. This Court upon all questions of general law, such as the construction of railway mortgages and other contracts, makes and follows its own precedents. (Townshend's Ram's Legal Judgment, 269–299, and cases in notes.) The construction sought to be placed upon this unreported opinion would cause it to overrule the opinion of CHIEF JUSTICE NICHOLSON, reported in Clay *vs.* R. R. Co., 6 Heis., 421; whereas, the eminent Judge delivering the opinion, cites, quotes and approves the reported opinion of the Chief Justice. He says:

"*The net receipts* of the roads are pledged in this deed. *** The plain meaning of the deed is, that the profits of the road, *after discharging other charges upon the earnings*, are to be appropriated to the payment of * * * interest coupons and ultimately the principal; *the net profits only* are pledged in this deed. * * * * What are net profits? It must be the net products after discharging the expenses of earning such profits, * * * all legitimate expenses of running the road, keeping it in repair and supplied with the means of earning profits by efficient work in the usual way."—*Appendix to Brief for Appellant, pp. 4-5.*

But, without more, it is sufficient to say the unreported cause relied upon by appellant has no application to the question under discussion. In that case, it was found as a fact: "*the claim is not*

one arising after the deed was made."—(Appendix to Appellants' Brief, p. 5): and it was held, "without more, the earnings of the road are not liable to be attached to pay a debt *not created after the deed was made, but which existed before.*" (Appellants' Brief, 15, Appendix VI.) *In the case at bar the debt was created after the deed was made.* The liability now sought to be enforced accrued after mortgage, before appointment of receiver and pending the mortgage-company's operation of the road.—(Record, p. 1 and 4. Appellants' Brief, p. 2.)

It results that the case of Buck *vs.* R. R. Co. has no application to the case at bar, though contrary to appellants' insistence, it supports the appellee to the extent of declaring, without judicially holding, that "legitimate expenses of running" a mortgaged road are prior charges upon the income of the mortgaged railway; and the case of Clay *vs.* R. R. Co., 6 Heisk., 421, supports the implied proposition of Buck *vs.* R. R. Co, in maintaining that it is the duty of a mortgagor railway company in possession to defray necessary expenses of operation out of the gross income; and only to the net income does the lien of the mortgage attach. Or, more broadly stated, even though the mortgage assumes to pass all property of the mortgagor, owned and to be acquired, still if the mortgagor-company is permitted to remain in possession, it must operate the road, and operating expenses must be paid out of the income of continued operation; and, accordingly, when the parties to the mortgage-contract are held to the natural and necessary results of their agreement, it must be decided that current expenses are a prior charge upon current income—that all legitimate liabilities incurred in the operation of the road, as usual incidents of railway operation, must be first paid out of the earnings, before the rights of a mortgagee can attach. As will be attempted to be shown, this proposition is in accord with the rule of this Court. The only difference is that our State Court has not as yet had occasion to carry the doctrine to its ultimate legitimate consequences, as this Court has, by declaring that current expenses of operation—all legitimate liabilities incurred in the operation of a railroad—constitute first charges upon its earnings, and that the mortgagee can only claim the surplus after payment of such charges; but, furthermore, since the mortagee permits the mort-

gagor to remain in possession and to operate the road for the mortgagee's benefit, and since the mortgagor is entrusted by the mortgagee with the power to control the income of the road, to use the earnings at pleasure, to extend its road-bed, to purchase additional rolling stock and generally to improve its equipment and facilities, wherever the mortgagor diverts current income from its first and paramount function of paying current debts, the court will declare current expenses of operation *a continuing charge* upon current income, and will invoke the equitable remedy of marshalling to restore parties to their relative original rights. Therefore, since the only two relevant decisions of the Supreme Court of Tennessee, instead of favoring, by necessary implication and logical extension of the principles declared, oppose the proposition of appellant, let us look elsewhere for an answer to the question, what is *the general law?*

To collate and cite the variant decisions of the various courts of the Union would be at once easy and useless. A recent author has furnished this work ready to hand. (Jones on Railroad Securities, §§ 99 *et seq. passim*, and cases cited.)

It is necessary only to refer to the decisions of this Court. Appellee's counsel frankly and humbly admit their inability to reconcile them. To the common mind they seem to be in conflict. *Nam nobis componere tales lites.*

There had been two classes of decisions of State courts upon the effect of the mortgage upon subsequent earnings: The first is represented by Pullan *vs.* Cincinnati & Chicago Air Line R. R., 4 Biss., 35, which holds that the mortgage attaches to all subsequent earnings, whether gross income or net surplus, and debars all general creditors from reaching any funds of the mortgagor-company: The second is *illustrated* by Parkhurst *vs.* North Central Railroad Company, 19 Maryland, 1472, which makes the gross income subject to claims of the general creditor, and gives only the net surplus, or actual profits when ascertained, to the mortgagee. The question was first presented to this Court in Gilman *vs.* Illinois & Miss. Tel. Co., 91 U. S., 603. The Court, from a proper analysis of the mortgage contract and a discriminative consideration of the relations of the

parties, for the first time gives due weight to the fact that the mortgagee permits the mortgagor to retain possession and control income, and thus defines the effect of the mortgage upon subsequent earnings:

"Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profits could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be applied was in the discretion of the Company. The same discretion extends to the surplus. It was for the Company to decide what should be done with it. In this condition of things the whole fund belonged to the Company and was subject to its control."—*Per* MR. JUSTICE SWAYNE.

This is now the well settled rule of this Court, (Galveston R. R. Co. *vs.* Cowdery, 11 Wall 489; American Bridge Co. *vs.* Heidelbach, 94 U. S., 789; Fosdick *vs.* Schall, 99 U. S., 235, and cases cited,) and it has received the concurrence of the best considered opinions of the State Courts (Galena, &c., R. R. Co. *vs.* Menzies, 26 Ill. 121; Smith *vs.* Eastern R.R., 124 Mass. 154; Ellis *vs.* Boston, Hartford & Erie R. R. Co., 107 Mass., 1.). It is evident, therefore, that the courts have power, notwithstanding the comprehensive terms of railway mortgages, to apply current income and gross earnings to the satisfaction of general or floating debts incurred by the mortgagor-company. It required to go but one step further in order to declare a rule which would protect the rights of all parties connected with the mortgaged railway. It was not sufficient to say that liabilities incurred as incidents to the mortgagor's operation of the railway were prior charges upon the income derived from such operation. That income might have been diverted by the mortgagor into purchasing or construction of extensions, acquiring rolling stock, improving road-bed, equipment and facilities. So it was necessary to declare the claim of the general creditor, who becomes such incidentally to the mortgagor's operation of the road, a CONTINUING CHARGE UPON THE EARNINGS OF THE ROAD; and, if current income is diverted into permanent improvement or diminution of mortgaged debt, thus increasing the security and benefitting the mortgagee, it is necessary to invoke the equities of marshaling and subrogation to

restore the parties to their rights of payment in proper order. This rule seems plainly the logical result of the nature of the contract and the relations of the parties, and it is so manifestly the requirement of equity and policy that now that it has been authoratively declared we can only wonder that the courts so long hesitated to adopt it.

I. It was held as late as 1 Wallace, that the lien of the mortgage is superior to the claims of all general creditors. (Dunham *vs.* Peru & Chicago R.R. Co., 1 Wal., 254.) This rule was carried to the extreme result of declaring a contractor, who had built an extension of the mortgaged road, under a contract with the mortgagor in possession, that the contractor should hold the road until he was paid, must be deferred to the mortgagee.

II. In Miltenberger *vs.* Logansport R.R. Co., 106 U. S., 206, the rule was so far relaxed as to permit wages of employes and traffic balances due connecting lines to be paid, for the reason that such expenditures tended to preserve the mortgage security, and were allowable in the discretion of the Court.

III. In Union Trust Co. *vs.* Souther, 107, U. S., 591, the Court directed the receiver to pay all floating liabilities which accrued within six months before his appointment. In Fosdick v. Schall, this period had been fixed at three months, and in Miltenberger *vs.* Logansport R.R. Co., (*supra*) at ninety days.

Of the first-class of cases, it may be said that the result is inequitable, and the rule declared ignores the fact that the mortgagee permits the mortgagor to remain in possession with power and direction to operate the road and contract liabilities for the mortgagee's benefit.

Of the rule in Miltenberger *vs.* Logansport R. R., it may be truthfully asserted that it makes the measure of rights "the knotted chord of judicial discretion, and not the golden metewand of the law."

And of the third class of cases it is obviously true that the rules therein declared and enforced are judicial legislation which has not even the poor advantage of certainty to sustain it, for the courts vary *toto cælo* in fixing the *dead line* of payment.

It has been seen from the foregoing instances that the adjudications upon this subject do not present the familiar aspect of the development of a new branch of law by gradual extension of a continuous principle. To the contrary, the decisions rest upon inconsistent grounds, thus clearly evincing the want of satisfaction in the judicial mind with the reasoning of former opinions.

It remained for MR. CHIEF JUSTICE WAITE to formulate a rule which embraces the entire subject; which pays due regard to the rights of both mortgagee and general creditor; which will sustain analysis and bear criticism because it is evolved from the very essence of the contract, and which will uniformly work equity, because it securely holds the parties to the results, which just men would have contemplated in making the contract.

The reasoning by which the true rule was reached can be thus briefly stated: In permitting the mortgagor to remain in possession, the mortgagee intended it should operate the road; operation necessitates expense; power to incur expense ought to include the power to make payment; current income, though expressly included in the mortgage, must of necessity be used in defraying current expenses of operation; holding the parties to the necessary results of their contract, the Court will declare current expenses a prior and paramount charge upon current income; but, the operation of the road, in the ordinary course of the business, requires at times expenditures in excess and anticipation of the income; therefore, it is not sufficient that current income for any certain period, shall be applied to current expenses within that period; but current expenses are, in view of a Court of equity, a *continuing charge* upon the earnings of the road.

Fosdick v. Schall was a contest between the lessor of rolling stock and the mortgagee, the former seeking and the latter resisting an order for the payment of rent accrued pending the mortgagor's operation of the road. MR. CHIEF JUSTICE WAITE says (99 U. S., 356):

"The business of railroad companies is done to a greater or less extent upon credit." * * * Frequently floating debts "are permitted to accumulate in order that bonded interests may be paid and a disastrous foreclosure postponed, if not altogther avoi-

ded. In this way the daily and monthly earnings are taken from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses. * * * Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it is certainly not inequitable for the Court to require that what is due from the earnings to the current debt shall be paid before anything derived from the source goes to the mortgagors. In this way the Court will only do * * * what the company itself ought to do."

Thus is established the proposition that liabilities incurred by the mortgagor incidentally to operating the road are continuing charges upon the earnings of the road. But the case goes further. The Chief Justice continues:

"If it appears that bonded interest has been paid, additional equipment provided or valuable improvements made, it is within the power of the Court to *use the income of the receivership to discharge*" * * floating debts. * * * "While, ordinarily this power is confined to the appropriation of the income of the receivership and the *moneyed* assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of sale of the mortgaged property in the same way." Thus, if the Court uses the income of the receivership to pay old debts or in making permanent improvements upon the fixed property, the Court will pay back to the income, from the proceeds of the sale, what has been diverted."

Upon a question involving precisely the same issue (the application in that case being by a vendor of motive-fuel) the CHIEF JUSTICE had opportunity of repeating and confirming his opinion in Fosdick *vs.* Schall. Burnham *vs.* Bowen, 111 U. S., 776. Thus, by these concurrent and unanimous opinions, three propositions have become defined, fixed and certain:

FIRST—Current expenses of operation—all liabilities usually incident to running a railroad—accruing pend-

ing operation by the mortgagor in possession, as against a mortgagee, have prior right of satisfaction out of the earnings of the mortgaged railway.

SECOND—Such liabilities are *a continuing charge* upon the earnings of the railroad;

THIRD—But to reach the *corpus* of the mortgage-security, or of the fund accruing from its sale, it is necessary to show a diversion of earnings into enhancement of the mortgaged property by permanent improvements, or partial extinguishment of the mortgage debt.

And it would seem that the opinions of the CHIEF JUSTICE were framed with especial view to the case at bar. For there is *found* and certified in this cause the very kind of *diversion* contemplated by those masterful opinions. This is the SIXTH FINDING OF FACT:

"Since the appointment of the Receiver, he has, under the order and direction of this Court, and from the receipts of said East Tennessee, Virginia and Georgia Railroad, and FROM MONEYS RECEIVED BY HIM FROM THE TREASURER OF SAID RAILROAD COMPANY, UPON HIS APPOINTMENT AS RECEIVER, made permanent improvements on said road, and paid interest on underlying bonds of dates prior to the mortgage * * * to an amount in excess of said judgment of petitioner." (Record, p. 4.)

In other words, it is found and certified that the Receiver obtained, upon his appointment, from the Treasurer of the mortgaged road, and from subsequent earnings of the road, more than enough to satisfy Petitioner's claim, and that such sums have been used in making permanent improvements and paying interest on underlying bonds. This case is wholly within the rule, and more, it is precisely within the terms of the opinions in Fosdick *vs.* Schall, and Burnham *vs.* Bowen.

It is submitted, therefore, that the sole remaining question, *at general law*, is whether the petitioner, who claims compensation

for the wrongful death of her husband, and whose claim is evidenced by a conclusive judgment, is a general creditor, entitled to the protection of the rule in this case?

I. If there exists any distinction in right, merit or equity, between the claim of a petitioner for reparation for a tort, and the claim of a promisee for compensation for breach of a contract, it is too subtle to afford a basis for adjudication here. Actionable injury to a passenger grows out of a breach of contract to employ highest care to secure safety; and to an employe, the breach of a promise to observe ordinary care. Every *tort* is merely the breach of an implied contract. (Cooley on Torts, pp. 2, 3.) As before shown, this Court has uniformly held that wages due employes, traffic and freight balances owing to connecting lines, demands for supplies and material furnished,—"all the outcome of indispensable business relations,"—are proper prior charges to the claim of the mortgagee. But can it be said with reason, that employes to aid transportation are more essential parts of business relations than goods and passengers to be transported? How can it be colorably insisted that the rights of connecting lines are paramount to the rights of passengers and shippers, when the only utility and value of connecting lines are to secure and serve passengers and shippers? Why have fuel, material or equipment, if there were no goods or passengers to haul? Where can a line be drawn between the contract and the tort of a common carrier? The law speaks through good pleading, and every action against a common carrier for injury to persons or property *sounds in contract.*

II. We yield due weight to the persuasive force of the opinions at circuit in Central Trust Co. *vs.* R. R. Co., 30 Fed. Rep., 895, and Davenport *vs.* Receivers, 2 Woods, 519. Of course, neither case possesses authority here, were either in point.

Neither case applies to this. The first was for an injury "*occurring more than four years before suit for foreclosure.*" (Appellants' Brief, 31.) The sentence italicized and relied upon by appellant was pure *dictum*. And, it is submitted with respect, the decision, even upon the point adjudged, merely holds that the Receiver's earnings, and not the *corpus* of the mortgaged prop-

erty, constitutes the fund to which one injured by the torts of the Receiver's employes must look.

Like every other well considered case that can be cited, this case supports appellees' contention in that it holds that current expenses of operation are a just charge upon the income from operation. It is not in conflict, but in entire accord with the general rule of all courts, and the well settled rule of this supreme tribunal.

The case of Cowdrey *vs.* Galveston, &c., R. R. Co., contains the rule of this Court. MR. JUSTICE FIELD, after stating that the question arose upon exception to a Master's report allowing "certain sums for goods lost in transportation, and damages done to property whilst the road was under the management of the Receiver, amounting to $7,565," says:

The allowance of damages for goods lost in transportation, and damages done to property while the road was in the hands of a receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after *charges of this kind*, as well as the expenses incurred in their behalf, were paid." —(93 U. S., 352.) And this is the rule of the State Courts. (Little *vs.* Dusenberry, 46 N. J. Law, 614; Meara *vs.* Halbrook, 20 Ohio St., 137; Newell *vs.* Smith, 49 Vt., 255; Page *vs.* Smith, 99 Mass., 395.)

It is the uniform practice for courts to order payment of claims for injuries to persons and property inflicted, pending operation by receiver. How can a distinction be made between the rights of such claimants and those who are injured pending operation by the mortgagor? The mortgagor operates the road for the mortgagee's benefit, just as the receiver does. Equally and in the same way, the mortgagee is entitled to the net earnings of both, after payment of liabilities incurred in operation.

III. The holdings in Central Trust Co., *vs.* Wabash, St. L. & P. Ry. Co., 38 Fed Rep., 871; and Thomas *vs.* Peoria & R. J. Ry. Co., 37 Fed. Rep., 808, should not be followed, because they are not in point. The difference between those cases and the case at bar, lies in the fact that they were merely applications by a gen-

eral creditor to be paid out of the receiver's earnings and the proceeds of the sale. The language of MR. JUSTICE MATTHEWS in St. Louis R. R. Co. *vs.* Cleveland, 125 U. S., 658 applies. In those cases it does not appear, as it does in this, that the receiver received from the treasury of the company more than enough of money to pay the prior general creditor. The priciples of a continuing charge and the equity of restoring diverted earnings, so forcibly and clearly declared in Fosdick *vs.* Schall and Burnham *vs.* Bowen, were not involved in those causes. Granted that the rights of the mortgagee to receiver's earnings and proceeds of sale are superior to the claim of a general creditor, *who holds merely a floating debt without more.* But, if the general creditor holds a debt which the mortgagor should have paid out of his earnings, and if such earnings were diverted to other purposes and for the benefit of the mortgagee, then the general creditor can claim, by substitution, compensation out of the receiver's earnings and, if necessary, even out of the proceeds of the sale.

IV. It cannot be said that injury to person and property is not properly an "incident of operation of the road;" compensation for such injury "a legitimate expense of running the road" (Buck *vs.* R. R. Co.); "a necessary operating expense" (Fosdick *vs.* Schall); "a part of loss and damage and * * charges incurred on behalf of the mortgagee" (Cowdry *vs.* R. R.); or "a part of the necessary expenses to be regarded as incidental liabilities incurred by the company in operating the road" (10 Ohio State, 642). Common knowledge contradicts such a proposition. No railway was ever operated without incurring such liabilities as incidental to running expenses. There were 8,215 persons killed or injured in the operation of the railways of the United States in the single year of 1880. (Comp. Tenth Census, 1267.)

If, then, a claimant for compensation for personal injuries is a general creditor within the protection of the rule in Fosdick *vs.* Schall, this case is controlled by that opinion; and this judgment is supported by the general law, and is correct, independently of any statute. Thus equity is attained by giving to the mortgagee all profits, while exacting payment of all expenses; and thus public policy is subserved by affording proper protection to the mil-

lions in numbers and amounts annually involved in the necessary operation of mortgaged railways.

If the view of the general law submitted is correct, the legislation of Tennessee is merely confirmatory. But if it be incorrect, the necessity and purpose of that legislation will more clearly appear.

Second. Statute Law.

The Act of General Assembly of Tennessee, 24 March, 1877, makes petitioner's judgment superior to the lien of the mortgage of 15 June, 1881.

This Act provides "that no Railroad Company shall have power "under this Act, or any of the laws of this State, to give * * "any mortgage * * * on its railway property, in this State, "which shall be valid and binding against judgments * * * "for damages done to persons * * * in the operation of its "railroad in this State."

Petitioner's judgment is confessedly for damages done to a person by the mortgagor in the operation of its railroad in said State. The Act was passed four years before the execution of the mortgage. The mortgage embraced railway property in Tennessee. As to all such property, therefore, the Act makes said judgment superior to the lien of said mortgage, unless its plain, perspicuous provisions may somehow be evaded. (See Appellants' Brief, p. 13.)

I. APPELANTS' RESORT TO CHARTER-RIGHT IS VAIN:

1. Because the charter of the remote, defunct, partial predecessor of the present corporation is matter *dehors* the record.

This record does not contain the charter of the old E. Tenn., & Va. R. R. Co., nor any reference thereto. That charter is new matter, presented by original plea in this Court. It was not offered to the Court below, and cannot now be considered here. It was matter for proof, not for judicial cognizance—the charter of a private, not of a public corporattion—relied on here by appellants (Brief p. 17) as a contract—not a public, but a private law; and hence not judicially cognizable.

The charters of such corporations only as are created as public agencies to perform governmental functions, as municipal corporations and banks of issue, are public laws, of which courts take judicial notice. A railroad charter is not such a law. (2 Kent's Com., * 275; Cooley's Const. Lim., * 238; Potter's Dwarris, p. 53.)

2. There is no proof that this charter of the old E. Tenn. & Va. R. R. Co. was the charter of the mortgagor, the E. Tenn., Va. & Ga. R. R. Co.

The Act of February 25, 1869 (Appellants' Brief, p. 6) *authorized* the consolidated company to adopt the charter of *either* of its predecessors, not of both. There is nothing in the Record to show which, or whether either, was adopted. There is a presumption one was adopted. It is mere assumption to say which one.

3. But assume with appellant that the charter here offered was adopted; and yet there is no charter authority for *this* mortgage.

That charter (appellants' Brief, p. 5), authorized that old Company to "borrow money * * on the mortgage of its charter and "works," *only* "to increase its capital to a sum sufficient to com- "plete said road and to stock it with equipment."

Such limited power did not authorize such a consolidated mortgage as this on a completed road, covering property in four States, and securing $22,000,000 of bonds, for general purposes.

4. The very statement of the case excludes consideration of this question.

No claim to charter authority having been made in the Court below, no notice having been taken of this charter, and no reference being made to any other other act, public or private, for authority for said mortgage, it is presumable, in favor of the correctness of the judgment below, that it appeared to the Court as *matter of fact* that the mortgage purported to be and was executed, not under charter right, but under authority *only* of the Act of 1877, the *only* Act named in the Record as causing difference of opinion.

This presumption is rendered certain by Appellants' Brief, p. 18:

"For power to purchase new "lines of railroad * * the *consoli-*
"*dated corporation* (*i. e.*, the mortgagor company) *availed itself of*
"*the Act of Dec. 12, 1871.*"

Now, that very Act (See Appellants' Brief, p. 8), in the very section and sentence granting the power to purchase, thus "availed of" by said Company, gives also the power to mortgage "the *whole* "or *any part* of its railroad and equipment and other property and "franchises," to secure bonds "issued for * * indebtedness "incurred in the exercise of lawful purposes."

This Act gave equal and concurrent power to *purchase and mortgage*. It was authority for this very mortgage. And this "consolidated company" "availed itself" of this very authority in this section granted, both to purchase and to mortgage.

But before the purchase and mortgage, in this Record recited, the supplementary Act of 1875 was passed (See appellants' Brief, p. 9), and also the Act of 1877 aforesaid, which amended the entire "Law in relation to the consolidation of Railways," and especially the Acts of 1871 and 1875 aforesaid, and forbade this "consolidated corporation" from exercising this mortgage-power to the prejudice of floating creditors specified therein. This Act of 1877, Sec. 1, extended the rights, powers and privileges granted by the Acts of 1871 and 1875, including, of course, power and mortgage to *all railroad corporations*, (consolidated) existing or unborn, native or adopted; and then to Sec. 3 was attached the salutary *proviso* here so ingeniously sought to be evaded. It surely limited the power of all *consolidqied corporations* subsequently taking the benefits of these Acts: and one such was appellants' "*our company.*"

This use of the act of 1877, by "our company" in *purchasing* new lines of railroad in 1880-81, and, of course, in issuing bonds to raise money to pay for them, shows also that all the transactions under review in this case were had under the Act of 1877, and not that of 1881, also relied on by appellants, which was enacted after these purchases, and for a different purpose, viz: to enable railroad companies to *lease* or *build* railroads in any State or States, and to *deal in stocks and bonds* of railroads in any State of the Union. (See Appellants' Brief, p. 13.)

II. This provision of the Act of 1877, in favor of floating creditors is not repealed by *implication,* by the Act of 1881.

It is true that repeal by implication "obtains in Tennessee," but it never obtained much.

Implied repeals are not favored, and when both acts can well stand together, a repeal will not be implied. (Hockaday *vs.* Wilson. 1 Head, 114.)

The repugnancy between the new statute and the old must be plain and unavoidable. (Buchanan *vs.* Robinson, 3 Bax., 152.)

Repeals by implication are never allowed, unless the latter and former acts cannot *possibly* stand together. (Hall *vs.* State, 3 Lea, 557.(

If a subsequent act can be reconciled with a former one, it *shall not* be a repeal. Smith *vs.* Hickman, Cooke, 330.)

Can the Act of 1881, and the "Law in relation to the Consoli-"dation of Railways," stand together?

Absence of the limitation on mortgage-power in the Act of 1881 is the *only* reason given why they may not. But a comparison of the two Acts will show that the giving of power to mortgage was merely incidental to the main purpose of the legislation, and that the purposes of the former Acts and of the last were quite distinct.

The previous Acts of 1869, 1871, 1875, and 1877 (See appellants' Brief, pp. 6–10), had been passed to authorize consolidation and gave the right to "acquire by purchase * * and operate" other lines of railroad, and, for that purpose, to borrow money and mortgage roads.

The Act of 1881 (Appellants' Brief, p. 13) gave to railroad companies power to build, lease or let railroads in any State or States; to deal in their stocks and securities; to endorse and guarantee their bonds. It also gave power to mortgage and to issue income bonds, and guaranteed common and preferred stock, and thus generally to act as railroad brokers anywhere in the Union. No intention whatever is manifested to repeal the provisions of the old law, holding the railway property of *consolidated corporations, within the State*, subject to general creditors, notwithstanding mortgage.

In view of the provision of the State constitution, that all acts repealing former laws "shall recite in their caption, or otherwise, the title or substance of the law repealed;" and of the settled aversion to repeal by implication, it seems plain that instead of intending to repeal the law enacted for the protection of the citizen, the Legislature meant by this Act to give railroad corporations of the State roving commission to deal in, and do all things with all railroads, their stocks and securities, anywhere in the United States. But no reason appears why the wholesome provisions of the Act of 1877, for the protection of the general public, may not still stand and hold the property in the State for their security.

Moreover, presuming in favor of the judgment below, we say the Court may have found *as fact* that the Act of 1881 did not apply to this mortgage, for the reason that its conditions were not complied within its execution, viz: that three-fourths of the stockholders did not assent to it; or that sixty days publication of notice was not made, as required by the Act; and hence that it was controlled by the Acts of 1877. This legislative intention to save the rights of the public against railroad mortgagees, had been definitely expressed by four successive legislatures next preceding that of 1881, until it had become the settled policy of the State, to reverse which should require expression by the Legislature of the plainest and most convincing character.

III. The mortgagor-company was within the terms of the *proviso* attacked by appellants.

"*No* Railroad Company shall have power," etc., is an inhibition

upon *all* railroad companies, and includes the mortgagor. This comprehensive clause may be limited by the title, which shows the legislation to be intended to amend the "Law in relation to the consolidation of railways." Therefore, the Act would apply to consolidated companies. But it would include *all* consolidated companies, and not merely those consolidated under the Act of 1877, because the *proviso* is applicable to the whole Act, which in its first section gives to all railroad companies the right of mortgage granted by the Act of 1871, and, in sections two and three, provided for further consolidation, and expressly gave such consolidations power to mortgage. And there is no language to exclude the operation of the *proviso* from the first section, and confine it to the second and third.

The only limitation possible, then, is expressed, not by the words "no such consolidated railroad company," suggested by appellants, but rather "no consolidated railroad company." Nor will the strict construction harshly invoked in favor of a class against popular right, aid appellants, as no construction can escape the force of plain intent of the Legislature on this subject:

No Railroad Company, availing itself of the benefits of the law in relation to the consolidation of railways, shall have power to make a mortgage that shall give preference to the mortgagee over a judgment creditor for damages to the person.

Third. The oft-quoted proviso of the Act of 1877 is Valid and Constitutional.

This seems so obvious as to scarcely deserve discussion. The contention of appellants to the contrary, involves the proposition that "the Law in relation to the Consolidation of Railways" does not embrace the making of mortgages by consolidated railway

companies. Appellants admit such construction must be given, if *possible*, as will make the proviso constitutional, that is, will limit its provisions to the title. That problem is readily solved by applying the general terms of the proviso to consolidated companies only. We are then within the letter and the spirit of both the Act and the title.

The entire body of State law on the subject of consolidation of railways was subject to amendment under the terms of the title: The first section gave "all railroad corporations (consolidated) in the State" the powers granted to *some only* by the previous Acts, including the power to make this mortgage. But the proviso postponed any mortgage made by any such company under this Act, or any other Act, to the lien of judgments of certain classes of creditors.

The Supreme Court of Tennessee, by repeated adjudication, has adopted the liberal rules of Construction, expressed by JUDGE COOLEY in his work on Constitutional Limitation, and applied and enforced the doctrines:

1. Generality is no objection to the title of an Act;

2. Any provision directly or indirectly related to the subject expressed in the title, and not foreign thereto, may be properly included in the Bill;

3. Such construction is to be given to the Act as will limit it to the subject embraced in the title, *ut lex magis valeat quam pereat.* (Cannon *vs.* Mathes, 8 Hskl., 517; Luehrman *vs.* Taxing Tax. Dist., 2 Lea, 428; State *vs.* McConnell, 3 Lea, 81; Morrell *vs.* Fickle, 3 Lea, 81; State *vs.* Whitworth, 8 Lea, 597; State *vs.* Wilson, 13 Lea, 253.)

From statement, admission and presumption, it thus appears in confirmation of the judgment appealed from, that the E. Tenn., Va. & Ga. R.R. Co., was formed a consolidated company under the Act of 1869; that by the Acts of 1871 and 1875, this Company was authorized to acquire by purchase other lines of railroad, and for that purpose to borrow money on mortgage of its entire property; but before it made any purchase or mortgage, the Act

of 1877, amending the law in relation to consolidated railroads, was passed, providing that no mortgages by consolidated companies, availing themselves of the benefits of the Acts of 1871 and 1875, should be valid and binding against judgments for damages done to persons and property; that in 1880-81. this Company availed itself of these Acts by purchasing other railroads and incurring debt therefor; that in 1881 it further availed itself of the benefit of these Acts by executing the mortgage of its property, authorized by said Acts; that the mortgage so executed was the one under which Receiver was appointed, and the fund now in Court was impounded; that the appellee was a judgment-creditor of the class protected by the Act of 1877, and has a right to this fund superior to that of the mortgagee; that therefore the judgment of the Circuit Court was warranted by express legislation, as well as under general law, and should be affirmed.

HENRY H. INGERSOLL,
of Counsel.

WALTER M. COCKE,
Solicitor.